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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. _____

MARY ALICE FIRESTONE,
Petitioner,

vs.

TIME, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, MARY ALICE FIRESTONE, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on April 20, 1972.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has as yet not been reported and is printed herein as an Appendix.

PREFACE

For the Court's convenience, the Appendix filed by the Respondent in the United States Court of Appeals for the Fifth Circuit has been certified to this Court as part

of the record. Various references will be made to the Appendix in lieu of the more bulky trial transcripts or original pleadings. An Appendix containing the opinion and judgment of the United States Court of Appeals for the Fifth Circuit is attached to this Petition. The following symbols will be used as references:

"A" Three volume Appendix certified to this Court from the United States Court of Appeals for the Fifth Circuit.

"AP" Appendix attached to Petition.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on April 20, 1972. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1) and United States Supreme Court Rule 19 1(b).

QUESTIONS PRESENTED

I

WHEN DOES A STATEMENT DEPART FROM THE BOUNDARIES OF FACTUAL REPORTING OF MATTERS OF PUBLIC INTEREST AND BECOME A PURELY PRIVATE LIBEL?

II

IN REVIEWING A FINAL JUDGMENT AWARDING DAMAGES IN A LIBEL ACTION BROUGHT BY A PRIVATE CITIZEN, TO WHAT EXTENT MAY A UNITED STATES COURT OF APPEALS MAKE A *"DE NOVO"* "INDEPENDENT CONSTITUTIONAL JUDGMENT"?

III

BY WHAT BURDEN MUST A PLAINTIFF IN A LIBEL ACTION INVOLVING FIRST AMENDMENT PRIVILEGES PROVE THE FALSITY OF THE PUBLISHED STATEMENT—MUST THE PLAINTIFF PROVE THE FALSITY OF THE STATEMENT BY A PREPONDERANCE OF THE EVIDENCE OR BY "CLEAR AND CONVINCING PROOF GREATER THAN A PREPONDERANCE"?

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV, SECTION 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case was tried in the United States District Court for the Southern District of Florida without a jury by stipulation of counsel. The jurisdiction of the District Court was invoked under the diversity of citizenship provisions of 28 U.S.C. §1332.

In Petitioner's Amended Complaint, she contended that an article published and distributed by the Respondent in its magazine, Life, was both false and malicious. Further, that as a result of Respondent's action and conduct, Petitioner suffered damages in the following respects: (1) She was severely injured in her "personal relations" and reputation in the community so as to subject her to distress, contempt, ridicule and humiliation. (2) The article falsely implied that she was guilty of bribery and was "inciting to commit perjury". (3) She was injured in her then pending private marital litigation. Petitioner also sought punitive damages from the Respondent. (A-2-7)

While the overall article ostensibly dealt with the general subject of eavesdropping and wiretapping, a particular portion of the article was devoted entirely to the Petitioner, her pending marital difficulties and the invasions of her privacy and embarrassment to which she had recently been subjected. Additionally, the article stated that the Petitioner had been "spying" on her estranged husband. The article was captioned, "DIVORCE SPY", and read as follows:

> "TWO-WAY SNOOP. In Florida where electronic eavesdropping is frequently employed in divorce suits, private eyes like Jack Harwood of Palm Beach, shown above with some of his gear, do a thriving business. Harwood, who boasts, 'I'm a fantastic wire

man', was hired by tire heir Russell Firestone to keep tabs on his estranged wife, Mary Alice. She in turn got one of Harwood's assistants to sell out and work for her and says Harwood, 'He plays just as rough with the bugs as I do'. A court recently ordered Russell and Mary Alice (right) to stop spying on each other." (A-9)

Subsequent to the filing of the Petitioner's Amended Complaint, the District Court, Judge Atkins, presiding, dismissed that Amended Complaint for failure to state a cause of action. On appeal, the United States Court of Appeals for the Fifth Circuit held that the complaint as amended adequately stated a cause of action for libel per se and libel per quod and remanded the case to the District Court. *Firestone* v. *Time, Inc.*, 414 F.2d 790 (5th Cir. 1969)

The Respondent then moved the District Court for the entry of a summary judgment in its favor. On December 2, 1969, the Trial Court entered its order denying the Respondent's Motion for Summary Judgment, holding that:

"The Court is of the opinion that the Plaintiff is not a 'public figure' under these authorities. And, while the general subject of eavesdropping may be considered a 'matter of great public concern', certainly the Plaintiff's private marital difficulties, as referred to in the article are not of that character. Thus, while the general subject matter of an article might be protected, it does not follow that every particular reference therein is similarly immunized. It should also be stated that the fact that a publisher sees fit to refer to a particular individual in print does not establish the 'public' character of the personal reference.

The law in this area is not stretched so far as to allow the publisher to create its own defense to possible litigation." (A-16, 17)

The order further stated that even if the Petitioner's Amended Complaint was subject to the constitutional defense under the doctrine laid down in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the affidavits submitted by the Court clearly presented issues of fact to be presented to a trier of fact. (A-17-19)

In its order, the Court allowed the Respondent to make application to the Circuit Court of Appeals for the Fifth Circuit for review of the order and the Respondent availed itself of that opportunity. On the 29th of January, 1970, the Court of Appeals denied the Respondent's application for review of the aforesaid order of the District Court and also denied a re-hearing on application on March 24, 1970. The Respondent then filed its Petition for Certiorari to this Court and certiorari was denied on June 1, 1970, 398 U.S. 940 (1970).

This case proceeded to trial commencing on August 17, 1970, and on February 10, 1971, the Honorable Judge Emett C. Choate entered the Court's findings of fact and conclusions of law. (A-927-938)

The evidence at trial disclosed that prior to the publication of the article in question, the Respondent never requested or received any permission for its publication. (A-45, 46, 284, 815) David Chandler, a stringer, that is a reporter who worked on a commission or hourly basis for the Respondent, was the person in the large Time, Inc. organization who was the actual creator of the article although Richard Billings, another Life employee, did the actual writing of the article. (A-91) Richard Billings relied totally on information provided by David Chandler

in writing the article. (A-256, 263, 274, 279-281) At no time was any effort made to verify any statements made by Chandler and the article was published substantially as submitted by him. (A-92)

David Chandler was hired by Richard Billings to act as a stringer for Life without any investigation of Chandler's background or reputation for truth and veracity. The evidence at trial disclosed that David Chandler's reputation among persons who had known him for truth and veracity was disgraceful. (A-145, 151, 152, 268, 269, 408, 409, 613, 616)

Chandler's reporting duties led him to John Harwood (who was pictured above the Petitioner and her husband in the article). At trial, Harwood denied making any statements to Chandler which could have furnished any basis for the subsequent article. While Harwood did state that he may have mentioned to Chandler an opinion concerning whether Carl Geisler, the employee referred to in the article, had gone to work for the Petitioner, he testified that he made it clear to Chandler that his only source of such information was *an anonymous phone call in the middle of the night* and he had no basis on which to verify this belief. (A-472, 487) Chandler further knew that John Harwood had continued to employ Carl Geisler for at least four months subsequent to these phone calls and that when Carl Geisler was discharged, it was not on the basis of these anonymous calls. (A-505) Furthermore, Chandler knew and conveyed the fact to the Life Magazine staff that Harwood had "developed a paranoid hatred" of the Petitioner. (A-73) As stated by Judge Bell of the Court of Appeals in his specially concurring opinion:

> "There was much to put Life on notice to move cautiously. A description of Harwood's work style was

> revolting to the point that one might question his credibility. In addition, Chandler drew the conclusion that Harwood had 'developed a paranoid hatred' of Mrs. Firestone. Life made no check with anyone other than Chandler before publishing this statement." (AP-A21-A22)

The Petitioner testified at trial that at an interview with Chandler, she was requested by him to engage in sexual intercourse in exchange for his "being kind" in his article. When she refused, he told her she would be sorry. (A-174, 175)

On February 23, 1971, the District Court entered its Judgment On Findings Of Court For Plaintiff, awarding the Petitioner $15,000.00 compensatory damages and $15,000.00 exemplary damages against the Respondent. (A-939, 940) After the entry of the Judgment, Time, Inc. filed its Notice of Appeal. (A-940, 941)

On April 20, 1972, the United States Court of Appeals for the Fifth Circuit reversed the Final Judgment of the United States District Court for the Southern District of Florida. The Court was unable to arrive at a majority opinion. Judge Ainsworth reversed the Final Judgment in favor of the Petitioner on the basis of his "own independent *de novo* review of this case" (AP-A17) in which he determined that there was no showing of reckless or malicious conduct on the part of the Respondent. Judge Bell specially concurred in the reversal of the Final Judgment but disagreed with Judge Ainsworth that the United States Constitution sanctioned a *de novo* review of the record. (AP-A22, A23, A24) His opinion was based, however, on the fact that there was no clear and convincing evidence that the statement published by the Respondent was false. (AP-A22) Judge Godbold also specifically con-

curred in the reversal of the Final Judgment, but he also rejected the "independent de novo" standard of review enunciated in Judge Ainsworth's opinion. He concluded, however, that the statement published by the Respondent did involve "an issue of public or general concern" as enunciated by this Court in *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 44, 45 (1971) and concluded that the record failed to provide substantial evidence of reckless or malicious conduct on the part of the Respondent. (AP-A24, A25)

It is from the three separate opinions rendered by the United States Court of Appeals for the Fifth Circuit that Mary Alice Firestone brings her Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

The most recent case in which this Court has been called upon to interpret the extent of constitutional protection afforded to defamation of private citizens other than public figures was *Rosenbloom* v. *Metromedia*, supra. In that case, a three member plurality of the Court announced the opinion:

> "[T]hat the time has come forthrightly to announce that the determinate whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases." Id. at page 44.

As that case involved a radio publication clearly dealing with matters of public or general concern, there was no compelling reason for the Court to consider individual interests in privacy. Id. at page 48. The Court was therefore not called upon to determine which areas of a private individual's life are his own and which areas are of "public interest" and thus protected by the constitu-

tional qualified privileges of *New York Times Co.* v. *Sullivan*, supra. The plurality opinion did, however, indicate that, "[S]ome aspects of the lives of even the most public men fall outside the area of matters of public or general concern." Id.

In the case sub judice, the primary issue is whether the Petitioner's private marital difficulties were of "public or general concern". Unlike *Metromedia*, the present task of determining and separating the Petitioner's interest in privacy and dignity from the public's right to be informed with regard to matters of general concern is not so easily accomplished. While the overall theme of the Life Magazine article may have been of public concern, that portion which defamed the Petitioner related solely to private aspects of her life. It is respectfully submitted that the facts of the instant case present for the Court's consideration an important question relating to First Amendment rights. This Court should accept jurisdiction of the cause in order to render a decision with regard to this Federal constitutional issue and "to provide guidelines or standards by which Courts are to decide the scope of public concern". Id. at page 79, Justice Marshall and Justice Stewart dissenting.

The facts of the instant case also present significant additional issues involving areas of tension between First Amendment rights and the rights of private citizens to protect their reputations. In *Rosenbloom* v. *Metromedia*, supra at page 54, the view was expressed that, "This Court has an 'obligation to test challenged judgments against the guarantees of First and Fourteenth Amendments', and in doing so 'this Court cannot avoid making an independent constitutional judgment of the facts of the case'". The interpretation of that phraseology by the Fifth Circuit Court of Appeals has been inconsistent, giving rise to

three separate opinions and it is respectfully submitted that this Honorable Court should accept jurisdiction of this cause and announce a rule of general application delineating the scope of appellate review in constitutionally protected libel cases. To do otherwise would undoubtedly lead a significant portion of the appellate courts of this nation to sanction a case by case scrutiny of trial verdicts causing instability and confusion in the interpretation of First Amendment rights throughout the nation.

Finally, the standards by which a plaintiff in a First Amendment case must prove falsity of the defendant's statement has never been expressed by this Court. While Judges Ainsworth and Bell, below, found the standard to be one of "clear and convincing proof", it is respectfully submitted that this is an unwarranted extension of the requirements enunciated in *New York Times Co.* v. *Sullivan,* supra. This Court should, therefore, accept jurisdiction of this cause and hold consistently with *New York Times* that the burden of proving falsity is a preponderance of the evidence. Only the element of recklessness or knowledge need be proved by "clear and convincing" proof. *Rosenbloom* v. *Metromedia,* supra at page 30, impliedly so holds.

I

When Does a Statement Depart from the Boundaries of Factual Reporting of Matters of Public Interest and Become a Purely Private Libel?

The plurality opinion of *Rosenbloom* v. *Metromedia,* supra, extended the constitutional protections of *New York Times Co.* v. *Sullivan* to all discussions and communications involving matters "of public or general concern, albeit leaving the delineation of the reach of that term to future cases". Id. at page 44. As was noted by

the dissent, while *Metromedia* itself required no differentiation between the private and the public aspects of a citizen's life, other cases undoubtedly would.

The plurality opinion of *Metromedia* formed the backbone of the Fifth Circuit Court of Appeals' decision to reverse the final judgment of the District Court. As expressed in the opinion of Judge Ainsworth:

> "Our review of this case is written with the principles of the recent decisions of the Supreme Court in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811 (1971), squarely before us. In *Metromedia*, the Supreme Court reached a new dimension under the First Amendment constitutional protection for freedom of speech and of the press. No longer did the constitutional guarantee apply only to suits of public figures or public officials but in a sweeping decision the plurality opinion of the Court (by Justice Brennan) extended 'constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.' Id., 403 U.S. at 44, 91 S.Ct. at 1820. . . .
>
> "As now expressed by the Supreme Court in *Metromedia*, 403 U.S. at 44, 91 S.Ct. at 1820, 'It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a "public official", "public figure", or "private individual", as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest.'" (AP-A7, A8-A9)

Judge Bell's concurring opinion also assumed *Metromedia* to have extended First Amendment protections to the instant case.

> "This rule reached its full scope in *Rosenbloom* v. *Metromedia*, 1971, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed. 2d 296, when it was extended to place the same burden on any citizen if the utterance involved is related to an issue of public or general concern. 403 U.S. at 44." (AP-A18)

Finally, while Judge Godbold also accepted the conclusion that Life's publication was "within the *Metromedia* phraseology", he expressed his concern for the lack of guidelines on which he based his decision and noted "that the publisher may not, by mere artful characterization, force into the ambit of the phrase activities otherwise outside of its scope". (AP-A24)

The gravamen of the Petitioner's action against the Respondent is that the article unreasonably intruded into and fabricated private aspects of her life causing severe damage to her personal relations and reputation in the community. (AP-A3, A4) The United States District Court for the Southern District of Florida, after examining the evidence placed before it, agreed with the Petitioner's contention that the article dealt solely with private aspects of her life.[1]

---

1. "9. The Court has previously ruled, on defendant's motion for summary judgment, that the article in so far as it related to plaintiff was not constitutionally protected under the New York Times doctrine. The Court adheres to that ruling. The plaintiff was not of that class of persons who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.' Her private affairs were not a matter of legitimate public concern. The Court reiterates that the mere fact that a publisher sees fit to refer to a particular individual in print does not establish the 'public' character of the person or reference.

On appeal from the Final Judgment, it was concluded as a result of the *Metromedia* decision that the Respondent's defamatory statement was within the First Amendment protections announced in *New York Times Co.* v. *Sullivan.* These First Amendment protections were found to extend to the Respondent's publication despite the fact that the Petitioner was "a hapless private citizen, involved in a divorce proceeding with attendant wire tapping activity at the behest of her husband and his private detective-minion". (AP-A20)

It is respectfully submitted that the Circuit Court of Appeals departed from acceptable judicial procedure in overruling the finder of facts' conclusion that the article dealt with an area of the Petitioner's life which she had a right to expect to remain excluded from public view. More importantly, in holding as a matter of law that the Petitioner's private marital matters were "of public or general concern", the Court of Appeals decided an important issue of First Amendment rights and, in fact, opened the floodgates to the argument that any private aspect of a citizen's life is a matter of legitimate public concern if published by a major news periodical. Yet, as this Court stated in *Metromedia,* "[S]ome aspects of the lives of even the most public man fall outside the area of matters of public or general concern". Id. at page 48.

"10. Since *Butts* Lower Courts have extended constitutional protection to publications concerning matters of public interest apart from the public figure concept. See *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F.2d 858, 861 (5 Cir. 1970) in cases cited, note 4. However, this does not mean that every reference in such an article is automatically protected merely because the stated subject matter thereof concerns a matter of public interest. Thus, while the general subject of electronic eavesdropping might properly be considered a matter of public concern, the plaintiff's private marital difficulties as referred to in the article were not. The defendant concedes that the reference to plaintiff was merely 'illustrative', and it could have been deleted entirely without prejudice to the substance of the article." (A-931, 932)

The record of the trial proceedings was virtually void of evidence which would demonstrate the necessity of bringing the Petitioner's private life into the Life Magazine article. (A-932) Indeed, the testimony clearly showed that the Petitioner and her attorney were both led to believe that her private life would not be touched upon by the article. (A-174, 815, 820, 933) Even so, it is admitted that a determination of what areas of a private individual's life are his own and what areas are "of public interest", may often be a difficult task. See the dissenting opinions of Justices Harlan and Marshall in *Rosenbloom* v. *Metromedia, Inc.*, supra. Yet, for some time the appellate courts of this nation have been wrestling with that very issue in invasion of privacy actions and have been building "this infant area of the law . . . step by painful step". *Wagner* v. *Fawcett Publications*, 307 F.2d 409 (7th Cir. 1962), cert. denied 372 U.S. 909.

It has been held that the "touchstone is not whether the public is interested in plaintiff's views or conduct, for presumably that would apply to everything in the newspaper", *Afro-American Publishing Co.* v. *Jaffee*, 366 F.2d 649, 657 (D.C. Cir. 1966), and presumably "the publisher may not, by mere artful characterization, force into the ambit of the phrase activities otherwise outside its scope" (AP-A24), or create its own defense to litigation by referring to a particular individual in print. Yet, despite these obvious truisms the courts of this nation are nevertheless without standards by which they might distinguish between the public and private aspects of an individual's life. Judge Ainsworth, in his opinion, formulated the test of whether the particular portion of the article which related to the purely private aspects of an individual's life was "directly related to the central theme of the story". (AP-A9) Holding the private marital dif-

ficulties suffered by the Petitioner to be "germane to the article's principal theme and subject matter" (AP-A11), it was concluded that the Respondent was within the constitutional protections afforded by *New York Times Co.* v. *Sullivan.*

With the utmost respect for the opinion below, it is submitted that the tests formulated by Judge Ainsworth are erroneous and if allowed to stand will create chaos and instability, not only in the Fifth Circuit, but throughout the nation since the opinion below may provide precedent for similar decisions. There are few aspects of one's private life which could not, in some manner, be held "germane" to one public issue or another. Certainly the Petitioner's private marital difficulties were not, in their own right, occurrences of public or general interest. In order to bring a defamatory statement within the First Amendment protections, somewhat of a greater relationship between the statement and the public's interest in being informed must be demanded than was demanded by the Court of Appeals if individual reputations are to be safeguarded.

The Court's attention is called to 75 Yale L.J. 642, note, The Scope of First Amendment Protection for Good Faith Defamation Error (1966), cited by the Court at page 46 of the *Metromedia* opinion. While the note was published in 1966, its interpretation of First Amendment rights was well ahead of its time. That article called for an end to the "public official" and "public figure" doctrines and for an examination of the "public interest" aspects of each statement. The author went beyond what has been provided by *Metromedia,* however, to suggest guidelines for the determination of the public versus private aspects of an individual's life. At the same time, however, a reasonable degree of latitude was allowed for the teachings of experience. Page 648 of the article teaches:

"As Mr. Justice Stewart noted, concurring in *Rosenblatt*, the First Amendment is not the sole value in the field of defamation.

> 'The right of a man to protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being.'

"In order to override this interest in protecting individuals from false defamation about their private lives, there must be a *reasonable relationship between what is discussed and how the individual affects the public.*" [Emphasis supplied]

Any public interest overtones involved in the specific area of the article dealing with the Petitioner were extremely minimal and the private marital difficulties of the Petitioner or any imaginary relationship between herself and one of her husband's detectives can hardly be said to be published as a benefit to public knowledge. Yet, because the Court of Appeals found these matters to be "germaine" to the general subject of eavesdropping, they were said to fall within the First Amendment protection of *New York Times Co.* v. *Sullivan.*

At page 654, the Yale Law Review article deals with this very type of logic:

> "It is, of course, possible to imagine arguments which would make any private trait relevant to any public role. . . The judgment of relevance, though, should be much more stringent. The Courts should demand that the defendant show a relationship on the basis of evidence and not on the basis of an artificially, albeit imaginatively, constructed connection. The injury to individuals and to the climate of public discussion is too great to permit personally defamatory

falsehood to go unpunished when no overriding public interest is served."

For the above stated reasons, this Court should accept jurisdiction of the cause and provide adequate guidelines dispelling the growing view that a purely private defamation is privileged as long as the publisher has included it within a general discussion of a public issue.

II

In Reviewing a Final Judgment Awarding Damages in a Libel Action Brought by a Private Citizen, to What Extent May a United States Court of Appeals Make a "De Novo" "Independent Constitutional Judgment"?

In *Rosenbloom* v. *Metromedia,* supra, the plurality opinion expressed the view that Federal Appellate Courts "cannot avoid making an independent constitutional judgment of the facts of the case", and that First Amendment questions "compel this Court's de novo review". Id. at page 54. Yet, as was commented upon by Justice Harlan's dissent, *New York Times Co.* v. *Sullivan* announced a rule of general application for review of lower Courts' decisions and the phraseology of the plurality's opinion in *Metromedia* lent itself to an interpretation that a case by case review of evidence by appellate courts was now being sanctioned.

In an attempt to construe the phraseology of *Metromedia,* the Court of Appeals was unable to reach agreement and it is submitted that this lack of agreement is merely illustrative of the confusion presently existing throughout the courts of this nation with regard to the scope of appellate review in First Amendment cases. Judge Ainsworth, after a researched interpretation of the word "de novo" found it to mean "anew; afresh; again;

from the beginning". (AP-A10) Basing his review upon such a definition, he overruled the District Court's findings on three separate issues of fact. Firstly, Judge Ainsworth held that although the reference to the Petitioner in the Life article involved her marital difficulties, said reference was "directly related" (AP-A9) and "germane" (AP-A11) to the article's central theme. The District Court had previously ruled that, "[T]he reference to Plaintiff [Petitioner] was merely 'illustrative' and it could have been deleted entirely without prejudice to the substance of the article". (A-932)

With regard to a second issue of fact, Judge Ainsworth held that, "The evidence is conclusive that later Geisler wound up on Plaintiff's side of the divorce controversy and was seen several times in her company". (AP-A13) The District Court held that the article "falsely libelled the Plaintiff [Petitioner]" (A-937) basing its finding of fact undoubtedly upon the Petitioner's testimony that the article was "not true" (A-168, 169) and that, in fact, Mr. Geisler had never even been in her house. (A-206) The District Court's finding was further buttressed by the fact that the pictures submitted into evidence by the Respondent which purported to show Mr. Geisler in the company of the Petitioner had the face of "Mr. Geisler" obliterated. (A-205) Furthermore, three of the Respondent's own witnesses refused to identify "Mr. Geisler" from the photographs. (A-449, 457, 507)

Finally, by virtue of an "independent de novo review", Judge Ainsworth held that:

> "Billings and Life's editorial staff had a right under the circumstances to rely on Chandler, who relied on Harwood. There is no evidence in the record which would justify the conclusion that Life knew its cap-

tion in the article relating to Mrs. Firestone was untrue or that the editorial staff entertained serious doubts about its truthfulness sufficient to amount to recklessness." (AP-A17)

The District Court had found that:

> "Billings formulated the caption based largely on a statement of a man who, to his knowledge, had a 'paranoiac hatred' of the plaintiff. Billings and others on the defendant's editorial staff had no other information and sought none, and they necessarily had a high degree of awareness of the probable falsity of the statement. The conclusion is inescapable that he and others who worked on the caption had serious doubts as to the truth of the article in its published form. The formulation of the statement, 'She in turn got one of Harwood's assistants to sell out. . .', was done for the purpose of adding spice and sensationalism and with complete disregard for the interests of the persons affected." (A-936)

Judge Bell thoroughly agreed with the District Court's finding of fact on this issue (AP-A22-A23) and, as did Judge Godbold, took issue with Judge Ainsworth's use of the phrase "independent de novo review" and the "new procedure" announced by Judge Ainsworth by which review of the trial proceedings was conducted by him. (AP-A22-A25)

It is evident from Judge Ainsworth's opinion that in overruling the District Court's findings on three separate issues of fact, he engaged in a process of weighing the credibility of witnesses and rejecting and accepting testimony as a finder of fact. Clearly, in holding that Life entertained no serious doubts about the truthfulness of Chandler's reports and that Life had a right to rely upon Harwood, Judge Ainsworth simply excluded from consid-

eration the fact that Richard Billings knew the information came from a man with "a paranoid hatred" of the Petitioner and that Life's agent, David Chandler, knew that any rumor regarding the Petitioner and Carl Geisler had come to Harwood by an anonymous phone call in the middle of the night. (A-472, 487) This Court has held that under such factual circumstances, it is for the trier of fact to determine whether the article was published in good faith. The Court has specifically expressed the following view:

> "Professions of good faith will be unlikely to prove persuasive, for example, where a story fabricated by the defendant, is the product of his imagination, *or is based wholly on an unverified anonymous telephone call.* Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. *Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.*" [Emphasis supplied] *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968)

In holding that under the identical set of facts hypothesized by this Court in *St. Amant* the District Court could not properly find recklessness, Judge Ainsworth's opinion has created a direct conflict with the principles announced by this Court and has demonstrated his belief that appellate courts in First Amendment cases are free to weigh the credibility of witnesses and reject and accept testimony as a second trier of fact.

The use of the term "de novo" for the first time by the plurality in *Metromedia* has given rise to three separate opinions in the Court of Appeals in the instant case. Both Judges Bell and Godbold registered disagreement

with "the new procedure announced by Judge Ainsworth". (AP-A22) Both of these Judges pointed out that their interpretation of the phraseology does not exclude a deference to lower Court findings or allow the appellate court to make credibility choices. Judge Ainsworth, however, never specifically expressed his view with regard to the extent of review he deemed permissible. Nevertheless, by his reversal of the District Court's findings of fact, he has clearly indicated his belief that it is permissible to reject as unbelievable uncontradicted evidence of recklessness which under the dicta of *St. Amant* should clearly sustain a finding in favor of the Petitioner.

The confusion and disagreement created in the Court of Appeals for the Fifth Circuit with regard to the use of the term "de novo" is but the tip of an iceberg. Throughout the nation, courts will undoubtedly be forced to interpret this phrase. Justice Harlan's dissent in *Metromedia*, supra at page 63, warned that a feasible interpretation of the plurality's opinion could lead to a scrutiny of every jury verdict and an abandonment of the procedures announced in *New York Times Co.* v. *Sullivan*. It is respectfully submitted that a second trial of the facts surrounding First Amendment litigation was not what was intended by the plurality in *Metromedia*. This Honorable Court should, therefore, accept jurisdiction of the cause and delineate the proper reach of the term "de novo".

III

By What Burden Must a Plaintiff in a Libel Action Involving First Amendment Privileges Prove the Falsity of the Published Statement—Must the Plaintiff Prove the Falsity of the Statement by a Preponderance of the Evidence or by "Clear and Convincing Proof Greater Than a Preponderance"?

The Court of Appeals, in reversing the final judgment entered in favor of the Petitioner, expressed the view that the First Amendment required a showing by the Petitioner not only of the falsity of the published statement, but a showing of that falsity by "clear and convincing proof". (AP-A19) While Judge Ainsworth did not expressly discuss this issue, he did find the record lacking in evidence sufficient to justify by his standards the District Court's finding of falsity and as discussed previously, overruled this finding of fact. Of the three members of the panel below, only Judge Bell discussed at length the burden of proving falsity by this newly created standard. He readily admitted that this Court has never expressly added the requirement of clear and convincing proof of falsity to First Amendment cases, but found such a standard implicit in the stated requirement of *New York Times Co.* v. *Sullivan.* (AP-A19, A20)

Neither *New York Times Co.* v. *Sullivan* nor any subsequent case ever hinted at such a limitation upon the right of recovery for defamation. The essence of the *New York Times* privilege is that citizens may not be punished for good faith statements about public issues. Note, The Scope of First Amendment Protection for Good Faith Defamation Error, supra at page 651. This being the philosophy behind *New York Times,* the burden placed upon individual plaintiffs of demonstrating that an article was published with reckless disregard for their rights by

clear and convincing proof is well reasoned. This is all that *New York Times* requires. Supra at pages 279, 280, 285, 286.

However, the Court of Appeals has without justification or precedent extended the *New York Times* doctrine and created a new requisite to recovery. There can be no basis for extending this heavy burden of proof to the issue of the falsity of the statement and, indeed, the thought of doing so has never even been hinted at by any member of this Court. To allow the opinion below to remain in force would be to sanction an unwarranted extension of the *New York Times Co.* v. *Sullivan* doctrine and allow the creation of precedent which materially alters the established law with regard to First Amendment rights. For this reason, it is respectfully submitted that the Court should accept jurisdiction of this cause and declare that only the element of recklessness or knowledge of falsity need be proved by clear and convincing evidence. Such is clearly the intent of the long line of cases from *New York Times Co.* v. *Sullivan* to *Rosenbloom* v. *Metromedia.*

CONCLUSION

For all reasons stated herein, Petitioner prays that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1887

MARY ALICE FIRESTONE,
Plaintiff-Appellee-Cross Appellant,

versus

TIME, INC.,
Defendant-Appellant-Cross Appellee.

Appeals from the United States District Court for the Southern District of Florida

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(April 20, 1972)

Before BELL, AINSWORTH and GODBOLD,
Circuit Judges.

AINSWORTH, Circuit Judge: In this libel action against a publisher of a national magazine, we are called upon again to apply the principles of *New York Times Company v. Sullivan*[1] and its progeny, to determine if the constitutional guarantees of the First and Fourteenth Amendments confer immunity from claims for damages, under the facts and circumstances of the case.

Mary Alice Firestone filed this Florida diversity suit for compensatory and punitive damages based on alleged

1. 376 U. S. 254, 84 S. Ct. 710 (1964).

libel and invasion of privacy against Time, Inc., growing out of the publication of an article in Life Magazine, owned by defendant. The matter is before us for the second time. (See *Firestone v. Time, Inc.*, 5 Cir., 1969, 414 F. 2d 790, for our prior opinion.) When this case was first appealed, Mrs. Firestone's complaint had been dismissed by the District Court on motion to dismiss. However, we reversed and remanded for further disposition, since it did not appear to a certainty that plaintiff would be entitled to no relief under any set of facts which could be proved in support of her claim. Id., 414 F. 2d 790.[2] See also *Arthur H. Richland Company v. Harper*, 5 Cir., 1962, 302 F.2d 324, 325; *Shell v. Hensley*, 5 Cir., 1970, 430 F. 2d 819, 826; *Conley v. Gibson*, 355 U. S. 41, 45-46, 78 S. Ct. 99, 101-102 (1957).

The publication complained of appeared in Life Magazine on May 20, 1966, in a lengthy feature story about electronic eavesdropping. Highlighted on the cover of the magazine the article was entitled "THE BIG SNOOP," "Electronic Snooping Insidious Invasion of Privacy." The cover showed a young lady partially undraped with a tiny transmitter taped to her back where her dress in place would conceal it. On the first page of the article was a photograph of a "bugged martini" with a plastic olive containing a built-in sending device and toothpick antenna which it was said could transmit a cocktail party conversation 100 feet. The article referred to eavesdropping as a "multi-million dollar industry"; and said that bugging is "shockingly widespread" and "increasingly insidious." In ten full pages "LIFE reveals in detail this electronic assault on privacy . . . ." There are photographs and text

2. In our first opinion we concluded that "plaintiff's journey from *allegata* to *probata* may well be a hard one, but she is entitled to make the effort however illusory the destination may be in face of her contentions of innuendo." Id., 414 F. 2d at 791.

pertaining to all types of electronic eavesdropping devices and "bugs." On one page of the story a photograph is captioned "Divorce Spy." Pictured is Jack Harwood of Palm Beach, Florida, apparently the "divorce spy". Immediately beneath his photograph is another of Russell Firestone and his estranged wife Mary Alice Firestone, plaintiff in this case. The magazine's text concerning the photographs of Harwood and Russell and Mary Alice Firestone is the specific subject matter of this suit and reads as follows:

> "TWO-WAY SNOOP. In Florida, where electronic eavesdropping is frequently employed in divorce suits, private eyes like Jack Harwood of Palm Beach, shown above with some of his gear, do a thriving business. Harwood, who boasts, 'I'm a fantastic wire man,' was hired by tire heir Russell Firestone to keep tabs on his estranged wife, Mary Alice. She in turn got one of Harwood's assistants to sell out and work for her and, says Harwood, 'He plays just as rough with the bugs as I do.' A court recently ordered Russell and Mary Alice to stop spying on each other."

The Firestones were then engaged in marital litigation in a Florida State Court. The record discloses that the Harwood assistant referred to and about which there is considerable testimony was one Carl Geisler.

The two-count amended complaint alleged that the Life Magazine article defamed plaintiff where it stated, "She in turn got one of Harwood's assistants to sell out and work for her . . . ."; that plaintiff has enjoyed an unblemished reputation but, as a result of the defamatory article, has been severely injured in her personal relations and has suffered severe damage to her reputation in the community; that defendant well knew that the employee

[Geisler] said to have sold out to work for plaintiff was a private investigator who was to become a witness in the divorce action and whose credibility was severely damaged by the publication; that the defamatory words were intended to convey the meaning that plaintiff would incite Harwood's employee to commit perjury in violation of Florida Statutes, FSA § 837.04,[3] thus accusing plaintiff of committing a felony; that plaintiff's position in the court where the marital litigation is pending has been irreparably damaged by the article; that the publication has invaded the privacy of plaintiff's personal affairs causing her to become subject to disgrace and humiliation; that her private activities and her private divorce litigation were not matters of public concern or interest; that the defamatory language in the publication was false, to the knowledge of defendant, and was made with reckless and utter disregard for its truth or falsity, and with malice toward plaintiff. Defendant denied the allegations of the complaint and averred that the publication complained of was true, consisted of reports on matters of public interest, was made in good faith, pursuant to its duty to inform the public; that the publication was made without malice in a national news magazine of general circulation and is privileged and protected by the First and Fourteenth Amendments of the Constitution of the United States.

The case was tried before the District Judge, sitting without a jury, and resulted in judgment in favor of plaintiff for $15,000 compensatory damages and $15,000 additional punitive damages. Both parties have appealed, defendant contending that suit should have been dismissed

3. Florida Statutes, FSA § 837.04 reads as follows:
"837.04 Inciting to commit perjury
"Whoever endeavors to incite or procure any other person to commit perjury, though no perjury is committed, shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year."

in its entirety and plaintiff asserting that the award of punitive damages was inadequate.

The District Judge in written findings of fact and conclusions of law reviewed Florida jurisprudence relative to actions for libel under the law of that state.[4] He held that when Life's article stated that plaintiff caused one of Harwood's assistants [Geisler] to sell out to her, it necessarily charged that she paid him to betray her husband in a marital dispute between them, and that she had caused him to transfer his allegiance and confidentially obtained knowledge to her—in fact, that she "bribed" Harwood's assistant; that the article was actionable per se and libelous. He further held that the article was not constitutionally protected under the doctrine of *New York Times Company v. Sullivan*, 376 U. S. 254, 84 S. Ct. 710 (1964), because plaintiff was not of the class of persons referred to in that

4. The pertinent finding by the District Court reads as follows:

"4. Florida jurisprudence does maintain a general distinction between statements which are actionable per se and those which are actionable per quod. The only material difference, however, is that in the latter case special damages must be pleaded and proved while in the former, damages are conclusively presumed to result from the very nature of the defamatory statement.[2] Under Florida law, any written language published of a person which 'tends to degrade him, bring him into ill repute, to destroy the confidence of his neighbors in his integrity, or to cause other like injury to him is actionable per se.'[3]

"2. See 20 Fla. Jur., Libel and Slander, § 6 (1968); Firestone v. Time, Inc., 414 F. 2d 790, 791.

3. 20 Fla. Jur., Libel and Slander, § 22; Belli v. Orlando Daily Newspapers, Inc., 389 F. 2d 579, 582 (5 Cir. 1967)."

decision nor a public character and "[h]er private affairs were not a matter of legitimate public concern."[5] However, the District Judge made alternative findings and conclusions to the effect that even if *New York Times* were applicable plaintiff had sustained the burden of proof and was entitled to recovery. He held that Life's editorial staff "necessarily had a high degree of awareness of the probable falsity of the statements" attributed to Harwood relative to a "sell out," and that the conclusion was "inescapable" that the complained of words "sell out" were written "with reckless and wanton disregard for the truth and necessarily with serious doubts as to the truth" thereof. In his view, plaintiff suffered personal and public humiliation and her reputation was injured. In summary, the Court held that defendant had "falsely libeled" plaintiff, thus entitling her to compensatory and punitive damages.[6] However, the

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5. The Trial Judge's finding (No. 9) reads as follows:

"9. The court has previously ruled, on defendant's motion for summary judgment, that the article insofar as it related to plaintiff was not constitutionally protected under the New York Times doctrine. The court adheres to that ruling. The plaintiff was not of that class of persons who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.' Her private affairs were not a matter of legitimate public concern. The court reiterates that the mere fact that a publisher sees fit to refer to a particular individual in print does not establish the 'public' character of the person or reference."

6. The Trial Judge's finding (No. 21) held in pertinent part: "In summary, *the defendant has falsely libeled the plaintiff* for which she shall recover the sum of $15,000 as compensation for actual damages suffered." This is a finding that the Life article (insofar as it affected plaintiff) was false and untrue. Thus we differ with Time, Inc.'s Reply Brief which contends that the District Court did not even find the article to be false, though resolution of this issue is not critical to our decision herein, for reasons we have already explained.

Trial Court held that plaintiff had no action for invasion of privacy because she had given "limited consent" to publication.[7]

Our review of this case is written with the principles of the recent decision of the Supreme Court in *Rosenbloom v. Metromedia, Inc.*, 403 U. S. 29, 91 S. Ct. 1811 (1971), squarely before us. In *Metromedia*, the Supreme Court reached a new dimension under the First Amendment constitutional protection for freedom of speech and of the press. No longer did the constitutional guarantee apply only to suits of public figures or public officials but in a sweeping decision the plurality opinion of the Court (by Justice Brennan) extended "constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." Id., 403 U. S. at 44, 91 S. Ct. at 1820.

The holding in *Metromedia* was anticipated by this Circuit in several prior decisions beginning with *Time, Inc. v. McLaney*, 5 Cir., 1969, 406 F. 2d 565, cert. denied, 394 U. S. 921 (1962), where we held that "the constitutional

7. When the Trial Judge denied defendant's motion for summary judgment, in an order containing written reasons, he held:

"Defendant first contends that the article was constitutionally protected under the doctrine of New York Times Co. v. Sullivan, 376 U. S. 254 (1964) and the subsequent cases that have expanded those concepts. The court is of the opinion that the plaintiff is not a 'public figure' under those authorities. And, while the general subject of eavesdropping may be considered a 'matter of great public concern,' certainly the plaintiff's private marital difficulties, as referred to in the article, are not of that character. Thus, while the general subject matter of an article might be protected, it does not follow that every particular reference therein is similarly immunized. It should also be stated that the fact that a publisher sees fit to refer to a particular individual in print does not establish the 'public' character of the person or reference. The law in this area has not stretched so far as to allow the publisher to create its own defense to possible litigation."

privilege extends to discussions by specific individuals, not associated with any government, if those individuals are involved in matters of important public concern." 406 F. 2d at 573. Next, in *Bon Air Hotel, Inc. v. Time, Inc.*, 5 Cir., 1970, 426 F. 2d 858, we said, "This Court in Time, Inc. v. McLaney . . . noted that the New York Times actual malice standard is applicable to publications involving matters of great public interest." 426 F. 2d at 861. Then in *Time, Inc. v. Ragano*, 5 Cir., 1970, 427 F. 2d 219, we reaffirmed the applicability of the New York Times standard requiring actual malice where the alleged defamatory article concerned a matter of great public interest, a statement being made with actual malice if made "with knowledge that it was false or with reckless disregard of whether it was false or not." 427 F. 2d at 221; *New York Times Company v. Sullivan*, 376 U. S. at 280, 84 S. Ct. at 726. In *Dacey v. The Florida Bar, Inc.*, 5 Cir., 1970, 427 F. 2d 1292, we said again, "that the First Amendment privilege extends to discussions of specific individuals, not associated with any government, if those individuals are involved in matters of important public concern." 427 F. 2d at 1295.[8]

Thus, somewhat prior to *Metromedia*, the Fifth Circuit was already firmly on record, as the above decisions illustrate, as holding that the constitutional privilege in favor of a publisher extends to publications relating to specific individuals, whether public figures or not, if those individuals are involved in matters of "important public concern," or "of great public interest," or "of important public concern."

As now expressed by the Supreme Court in *Metromedia*, 403 U. S. at 44, 91 S. Ct. at 1820, "It is clear that

8. See also United Medical Laboratories Inc. v. Columbia Broadcasting System, Inc., 9 Cir., 1968, 404 F. 2d 706, cert. denied, 394 U. S. 921, 89 S. Ct. 1197 (1969).

there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a 'public official,' 'public figure,' or 'private individual,' as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest."

It cannot be doubted that electronic eavesdropping is a matter of general public concern. Apparently the Trial Judge thought so in this case.[9] We construe the briefs and arguments of the parties to concede as much. However, plaintiff contends that though the Life Magazine article on electronic eavesdropping may be an article on a subject of general public interest and concern, it does not confer an unlimited privilege on the magazine to discuss the private, personal and marital difficulties of plaintiff, and more particularly does not authorize the use of false and defamatory matter known to be false or with serious doubts as to its truthfulness.

In our view the complained of text of the Life Magazine article under the caption "TWO-WAY SNOOP" is directly related to the central theme of the story. It states that electronic eavesdropping is frequently employed in divorce suits. A photograph of Harwood, a person who apparently specializes in the use of such equipment, is likewise so related. Whether Life was justified in stating in the caption that plaintiff Mary Alice Firestone "got one of Harwood's assistants to sell out and work for her" must

9. See n. 3, supra.
See pertinent part of the District Court's findings (Finding No. 10) as follows:
"Thus, while the general subject of electronic eavesdropping might properly be considered a matter of public concern, the plaintiff's private marital difficulties as referred to in the article were not."

be measured against the New York Times standard of knowing or reckless falsehood. As a reviewing court, we "cannot avoid making an independent constitutional judgment" on the facts of the case. *Metromedia*, 403 U. S. at 54, 91 S. Ct. at 1825; *Jacobellis v. Ohio*, 378 U. S. 184, 190, 84 S. Ct. 1676, 1679 (1964).[10] "The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review."[11] *Metromedia*, 403 U. S. at 54, 91 S. Ct. at 1825.[12] Though civil litigation is ordinarily decided by the preponderance of the evidence, that standard along with the reasonable man standard of liability are rejected by the Supreme Court as being inconsistent with the First Amendment. *Metromedia*, 403 U. S. at 50, 91 S. Ct. at 1823. A negligence standard "gives insufficient breathing space to First Amendment values," *Metromedia*, 403 U. S. at 52, 91 S. Ct. at 1824; "[a] negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." *Time, Inc. v. Hill*, 385 U. S. 374, 389, 87 S.

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10. In *Jacobellis*, a First Amendment case involving a conviction for possessing and exhibiting an obscene film, the Supreme Court speaks of the necessity for recognition of the Court's duty to apply rules of law "upon the basis of an independent review of the facts of each case." Id., 378 U. S. at 189, 84 S. Ct. at 1678. See also Pennekamp v. Florida, 328 U. S. 331, 335, 66 S. Ct. 1029, 1031 (1946); New York Times Company v. Sullivan, 376 U. S. 254, 285, 84 S. Ct. 710, 728-729 (1964); Beckley Newspapers Corp. v. Hanks, 389 U. S. 81, 83, 88 S. Ct. 197, 199 (1967); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U. S. 6, 11, 90 S. Ct. 1537, 1541 (1970).

11. *De novo* is defined as meaning "anew; afresh; again; from the beginning." Random House Dictionary of the English Language (1966 ed.). See also Black's Law Dictionary (4th ed. 1951).

12. See also Edwards v. South Carolina, 372 U. S. 229, 235, 83 S. Ct. 680, 683 (1963), in which the Court refers to its duty "to make an independent examination of the whole record," and Blackburn v. Alabama, 361 U. S. 199, 205 n. 5, 80 S. Ct. 274, 279 (1960), in which the Court said, "we cannot escape the responsibility of scrutinizing the record ourselves." Both cases were, of course, First Amendment cases.

Ct. 534, 543 (1967). ". . . our 'cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' *St. Amant v. Thompson*, 390 U. S., at 731, 88 S. Ct., at 1325." *Metromedia*, 403 U. S. at 56, 91 S. Ct. at 1826. In this libel action the judgment in favor of plaintiff, a private individual, against the publisher of a national magazine "relating to [her] involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not." *Metromedia*, 403 U. S. at 52, 91 S. Ct. at 1824.

We have already determined that the Life Magazine article was on a matter of general public interest and that the part of the text relating to the Firestone marital difficulties and electronic eavesdropping employed in connection with the divorce action were germane to the article's principal theme and subject matter.

In our own independent *de novo* review of the facts of this case and in our search for the clear and convincing proof in the record which is required to sustain a judgment for plaintiff, we have examined the evidence to determine whether the magazine article was published with knowledge that it was false or with reckless disregard of whether it was false or not. Having done so we reach an opposite conclusion from that of the District Court. Clear and convincing proof greater than a preponderance is simply not to be found in the record. We suspect, for reasons we shall point out, that the Trial Judge used a negligence standard (or failure to use reasonable care) in determining

that defendant was liable. Employing such a standard is obvious error when we consider the Supreme Court's recent decisions involving freedom of the press as guaranteed by the First Amendment. Likewise, it should be remembered that since our review of the facts of the case is *de novo*, we are not bound by the findings of the District Court. *Time, Inc. v. Pape*, 401 U. S. 279, 284, 91 S. Ct. 633, 636-637 (1971).[13] It is at once apparent that the scope of review in First Amendment libel cases is the broadest possible under the law. The Supreme Court has fashioned such broad review because our early history and expressions by our founding fathers, such as Madison, indicate that liberty of the press is considered "sacred" in America, and that our free society is dependent for its survival upon a vigorous free press.[14] The immunity conferred by the First Amendment in favor of a publication is therefore designed

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13. In Time, Inc. v. Pape, supra, the Supreme Court said:
"The only question before us, therefore, is whether the Court of Appeals correctly applied this constitutional rule to the facts of this case in reversing the directed verdict for the defendant. Inquiries of this kind are familiar under the settled principle that '[i]n cases in which there is a claim of denial of rights under the Federal Constitution *this Court is not bound by the conclusions of lower courts, but will examine the evidentiary basis on which those conclusions are founded.*' Niemotko v. Maryland, 340 U. S. 268, 271, 71 S. Ct. 325, 327, 95 L. Ed. 267. Cf. Napue v. Illinois, 360 U. S. 264, 271-272, 79 S. Ct. 1173, 1178-1179, 3 L. Ed. 2d 1217. And in cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff. *New York Times*, supra, 376 U. S., at 284-285, 84 S. Ct., at 728; Beckley Newspapers Corp. v. Hanks, 389 U. S. 81, 83, 88 S. Ct. 197, 199, 19 L. Ed. 2d 248; St. Amant v. Thompson, 390 U. S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262; Greenbelt Co-op Pub. Ass'n v. Bresler, 398 U. S. 6, 11, 90 S. Ct. 1537, 1540, 26 L. Ed. 2d 6."
(Emphasis by the Court.) *Id.*, 401 U.S. at 284, 91 S. Ct. at 636, 637.

14. *Metromedia*, 403 U. S. at 51, 91 S. Ct. at 1823.

more for the protection of the public generally than it is for the publisher himself.

The facts show that when Life began assembling the materials for this article it sent David Chandler to Florida to make an investigation as a reporter into the use of electronic eavesdropping devices in connection with sensational divorce actions in that area. Chandler had originally been employed by Life in 1964 and had been working for the magazine for nearly four years at the time. His immediate superior, Richard Billings, considered him a reliable reporter based on his past experience with him in work he had done for the magazine. It was Chandler who provided the facts for Billings and Life's editorial staff which formed the basis of the caption in the article pertaining to plaintiff getting one of Harwood's assistants to "sell out" and work for her. The assistant referred to was Carl Geisler. It is undisputed that Geisler worked for Harwood in his private detective business at a time when Harwood was employed by plaintiff's husband Russell Firestone in surveillance of Mrs. Firestone, plaintiff herein. The evidence is conclusive that later Geisler wound up on plaintiff's side of the divorce controversy and was seen several times in her company. Chandler secured his information about the controversial "sell out" from Harwood and at the trial of this case Harwood testified that he had indeed told Chandler that Geisler, a former private investigator employed by him, was then working on the other side but Harwood said that he had told Chandler the information had come to him from anonymous phone calls.[15] He

15. Pertinent portions of Harwood's testimony at the trial of this case read as follows:

"BY MR. FRATES:

"Q. Mr. Harwood, let me show you your deposition. Do you recall the deposition when Mr. Stewart and I came up and Mr. Lindsey, this gentleman here, took your deposition—

testified that he told Chandler that he had suspicions that while Geisler was still employed by him he was friendly with Mrs. Firestone's side in the divorce contro-

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"A. Yes, sir.
"Q. —over in a court reporter's office—
"A. Yes, sir.
"Q. —and Mr. Stewart, this gentleman back here, interrogated you and had some conversations. Have you had an opportunity to read this deposition?
"A. I don't believe I have ever read it.
"Q. I ask you if this refreshes your recollection here, sir.
"MR. FARISH: What page, Counsel, so I can check it?
"MR. FRATES: Page 7.
"BY MR. FRATES:
"Q. 'And when you discussed—' I am reading from Line 9—*'when you discussed the Firestone case with Mr. Chandler did you discuss with him and did you advise Mr. Chandler and tell him that Geisler, after having worked for you, went over and worked for Mrs. Firestone?'*
"And your answer was 'Yes.'.
"Do you recall that?
"MR. FARISH: Your Honor, I object to that. Your Honor, has already ruled that is improper. He is trying to impeach his own witness.
"MR. FRATES: Now, sir, your Honor said that I could ask this one.
"MR. FARISH: He is trying to impeach his own witness, sir. He offered this man's testimony.
"THE COURT: I will sustain the objection. I let him read that so he could refresh his recollection—this man's memory what this man had said on a previous occasion.
"BY MR. FRATES:
"Q. Let me read the whole thing.
'Yes.' then 'On the other side of the case?'
And your answer 'Yes.'
"Q. And did you also tell him that it was your opinion that Geisler had sold out in going over to the other side?
"And your answer under oath was 'Yes.'
"Do you recall making those statements, Mr. Harwood—
"MR. FARISH: Object.
"MR. FRATES: Excuse me.—to Mr. David Chandler:
"MR. FARISH: To which I object, your Honor. He is attempting to impeach his own witness.
"THE COURT: I will overrule the objection for this particular moment, since it is—
"THE WITNESS: *Yes, sir, I remember making that on the deposition.*
"BY MR. FRATES:
"Q. And are those correct statements that you made under oath?
"A. Reasonably so, yes."
(Emphasis is supplied by the Court.)

versy. Harwood added that Geisler "had been acting very strange."

The information concerning the "sell out" was telegraphed by Chandler to Life Magazine at New York, attention of Billings.[16]

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16. Pertinent extracts from Chandler's dispatch to Life follow:

"HARWOOD HAS BEEN SHADOWING MARY ALICE SINCE JUST BEFORE FEBRUARY, 1964. SINCE THAT TIME, HE HAS DEVELOPED A PARANOIAC HATRED OF HER. HE CALLS HER A NYMPHOMANIAC PIG. SHE HATES HIM, TOO, BUT IS LESS DESCRIPTIVE ABOUT IT. *SHE WOOED ONE OF HARWOOD'S TOP INVESTIGATORS, CARL GEISLER, TO WORK IN HER INTERESTS. GEISLER AND MARY ALICE'S BROTHER, CHARLES TURNER, COMBINED AS HER AND HER THREE-YEAR-OLD CHILD,* MARK, *BODYGUARD.* (A. 73)

* * * *

"MRS. FIRESTONE CONTINUES: 'I MADE PHONE RESERVATIONS FOR A PLANE TO FREEPORT (BERMUDAS) AND TOLD NO ONE ELSE I WAS GOING. HARWOOD'S DETECTIVES WERE ON THE PLANE. THEY TOOK PICTURES OF ME WHEN I GOT OFF IN FREEPORT.

"ANOTHER TIME, I HAD GONE HOME ONE NIGHT AND GONE TO SLEEP AND ALL OF A SUDDEN HEARD THIS TERRIBLE NOISE, MORE THAN A NOISE, LIKE HORRIBLE. IT WAS THREE DETECTIVES KICKING THE DOORS DOWN. (*ONE OF THEM WAS CARL GEISLER ANOTHER WAS HARWOOD*). I SCREAMED AND CRIED. FLASHBULBS WENT OFF AND THERE I WAS STANDING WITH MY BABY AND THE NURSE. THE NEXT DAY I ASKED HER HUSBAND ABOUT IT AND HE SAID HE KNEW NOTHING ABOUT IT.

"THE DETECTIVES TOLD ME THEY WERE AFTER BURGLARS. THEY TORE OUT MY PHONE AND TOOK MY CAR KEYS AND SAID THE POLICE WOULD COME SHORTLY. THEN THEY LEFT. I THOUGHT THERE REALLY WERE BURGLARS THEY WERE AFTER. I WANTED TILL DAYLIGHT, THEN I WALKED TO A NEIGHBOR'S AND PHONED THE POLICE.

"(*HARWOOD VERIFIES THIS STORY AND SAYS IT IS ON THIS OCCASION THAT HE FIRST KNEW CARL GEISLER HAD SOLD HIM OUT TO MARY ALICE.*)

The District Judge in analyzing the testimony found that Billings and others on Life's editorial staff "had no other information [than Chandler's] and sought none, and they necessarily had a high degree of awareness of the probable falsity of the statement." The District Judge's opinion tends to show that he employed a negligence standard in assessing the evidence against defendant, which is an erroneous and improper standard, as we have previously

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"HIS STORY. 'I HAD LEFT GEISLER TO WATCH THE HOUSE. IT WAS RUSSELL'S HOUSE AND WE HAD PERMISSION TO ENTER. *GEISLER RADIOS ME THAT MARY ALICE AND SOME GUY HAD GONE TO THE HOUSE AND IT'S TIME TO MAKE THE BUST.* WE GET TO THE HOUSE AND GEISLER POINTS OUT THE ROOM HE SAYS MARY ALICE AND THE GUY ARE DRINKING IN. WE BUST IN THE DOOR. THERE'S MARY ALICE ALONE WITH THE BABY AND NURSE. WE LOOK THROUGH THE HOUSE. NOBODY. WE BUST RIGHT BACK OUT. (A. 76, 77)

* * * *

"MARY ALICE, GEISLER AND HARWOOD RELATE THAT FOR THE NEXT MONTH THE CHILD WAS KEPT UNDER ARMED DETECTIVE GUARD AT RUSSELL'S RENTED HOUSE. MARY ALICE, ALL AGREE, VISITED THE BABY DAILY, CRYING AND BEGGING TO BE GIVEN HIM. SHE WOULD USE THE PHONE AT THE RENTED HOUSE AND HARWOOD BUGGED THAT PHONE. *GEISLER FOUND THE RECORDER AND MADE HIS FINAL SPLIT WITH HARWOOD.* MARY ALICE GOT THE BABY BACK. (A. 77, 78)

* * * *

"LAST NEW YEAR'S EVE, HER BROTHER CHARLES TURNER NOTICES AN UNUSUAL AMOUNT OF WIRES IN THE GARAGE ADJOINING THE HOUSE. HE AND MARY ALICE TELEPHONE CARL *WHO INSPECTS AND FINDS THE TAP.*

" 'THE BATTERIES WERE LOW,' *SAYS CARL,* 'SO I HAD MARY ALICE TELEPHONE SEVERAL PEOPLE SAYING SHE WAS GOING OUT THAT NIGHT. I FIGURED THE TAPPER WOULD USE THE OPPORTUNITY TO REPLACE THE BATTERIES. *CHARLES AND GEISLER HID IN THE GARAGE.* SURE ENOUGH, IN ABOUT HALF AN HOUR THIS GUY COMES CREEPING INTO THE GARAGE. HE'S GOT HIS SHOES IN HIS HANDS. I JUMP HIM AND CALL THE POLICE. MAN, WE GOT HIM. WE GOT THE WIRETAP EQUIPMENT AND WE GOT THE GUY IN THE GARAGE TRYING TO CHANGE THE BATTERIES. WITH WITNESSES.' " (A. 78, 79)
(Emphasis by the Court.)

indicated. The Trial Judge's statement that "[t]he conclusion is inescapable that [Billings] and others who worked on the caption had serious doubts as to the truth of the article in its published form" is at odds with the evidence which we have scrutinized to find the clear and convincing proof of knowing or reckless falsehood requisite in this case.[17] The circumstance of Geisler working for Harwood who was employed by Mr. Firestone, and later working for Mrs. Firestone, plaintiff herein, in the same marital litigation has not been explained by plaintiff or her witnesses. Whether or not she procured the "sell out" or Geisler changed sides for some other reason is a matter of conjecture, but a resolution of that question is not necessary to our decision here.

Billings and Life's editorial staff had a right under the circumstances to rely on Chandler, who relied on Harwood. There is no evidence in the record which would justify the conclusion that Life knew its caption in the article relating to Mrs. Firestone was untrue or that the editorial staff entertained serious doubts about its truthfulness sufficient to amount to recklessness. Though the Trial Judge so found he did not support his finding with evidentiary facts. We have determined in our own independent *de novo* review of this case that the District Judge decided the case by employing erroneous legal standards and his conclusions are not supported by the record. Under *New York Times* and its progeny, especially *Metromedia*,

17. By coincidence the same finding was made by the District Court in *Metromedia* and the Supreme Court held that "there is no evidence in the record to support a conclusion that respondent 'in fact entertained serious doubts as to the truth' of its reports." Id., 403 U. S. at 57, 91 S. Ct. at 1826.

and the prior decisions of this Court, plaintiff cannot recover under the circumstances presented here.

REVERSED.

BELL, Circuit Judge, SPECIALLY CONCURRING:

I concur in the result reached by Judge Ainsworth that the evidence is insufficient to warrant recovery by plaintiff in this case, and thus in the reversal. My reasons for reaching this result differ, however, in substantial measure from those of Judge Ainsworth. Moreover, I reach the result without the use of the procedural euphuism—a de novo review in the appellate court.

I.

In *New York Times v. Sullivan*, 1964, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, the Supreme Court fashioned a procedural technique under the aegis of the First Amendment to insulate the communications industry from state libel laws. That case involved a libel action brought by a public official against a newspaper. The rule was announced that in such an action, the complainant must meet a standard of proof of convincing clarity that a defamatory falsehood alleged as libelous was uttered with ". . . knowledge that it was false or with reckless disregard of whether it was false or not . . ." 376 U.S. at 280.

This rule reached its full scope in *Rosenbloom v. Metromedia*, 1971, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296, when it was extended to place the same burden on any citizen if the utterance involved is related to an issue of public or general concern. 403 U.S. at 44.

Also in *Garrison v. Louisiana*, 1964, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125, and again in *Rosenblatt v. Baer*, 1966, 383 U.S. 75, 84, 86 S.Ct. 669, 15 L.Ed.2d 597,

both public official cases, the court stated that the holding in *New York Times v. Sullivan* also establishes that the burden is on the plaintiff in such a case to establish the falsity of the utterance.[1]

safe freedom of the press.

Thus, the present rule is that the burden of the plaintiff in a libel action against the news media arising out of a defamatory publication, where a First Amendment defense is asserted, is (a) to establish by clear and convincing proof[2] that (b) the statement was false and (c), that it

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1. This is a departure from the rule that a defamation is presumed to be false with the burden being cast upon the defendant to plead and prove truth. Prosser, Law of Torts, p. 798 (4 Ed., 1971). It is also a departure from the Florida rule. See *Miami Herald Publishing Company v. Brautigam*, 1961, 127 So.2d 718.

The language used in *Garrison* was as follows:

> "We held in New York Times that a public official might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true." 397 U.S. at p. 75.

This can be read as permitting the presumption of falsity from a defamatory statement where the issue is reckless disregard as distinguished from an allegation of actual knowledge of falsity. Indeed, it is difficult to imagine how actual knowledge of falsity could be established without proof of falsity, thus explaining the use of this language in *Garrison*. However, it may be argued that where plaintiff relies on proof of reckless disregard for truth, no proof of actual falsity is necessarily implicit in plaintiff's case. Stated differently, in such a case, proof of falsity is not a logical prerequisite.

The view that Garrison does not intend to abrogate state law by requiring a plaintiff to prove falsity is reinforced by looking to the origin of the quote in *New York Times v. Sullivan*, supra, at 279-80. The court does not there or in later cases appear to deal with the question of proving falsity, but rather with what degree of awareness and proof thereof will excuse the publication of a falsity. Absent specific derogation of the state law should be preserved except where in direct conflict with the rule fashioned by the Supreme Court.

However, this narrow reading of the Garrison language should be rejected. Such would hardly comport with the other broad safeguards created in *New York Times* and its progeny to vouch-

2. The language "convincing clarity" in *New York Times*, 376 U.S. at 285-86, was transposed into "clear and convincing" in *Metromedia*, 403 U.S. at 30.

was published with the knowledge that it was false or with reckless disregard of whether it was false or not.

The Supreme Court has not expressly added the requirement of clear and convincing proof of falsity to the plaintiff's burden of proof. As stated, the burden of showing falsity has been imposed upon the plaintiff in First Amendment cases. *Garrison*, supra; *Rosenblatt*, supra. Such a standard of proof seems implicit however, in the stated requirement in *New York Times* that plaintiff has the burden of showing by clear and convincing proof that publication was with knowledge of falsity or with reckless disregard as to falsity *vel non*. I conclude for the same constitutional reasons giving rise to this stringent proof requirement that the clear and convincing proof standard would also apply to proving that the statement was false in the first instance.

Given the rule of *New York Times* with the gloss of *Garrison* and *Rosenblatt*, supra, as extended in *Metromedia*, the questions become first, whether plaintiff sustained her burden of establishing by clear and convincing proof that the published statement in issue was false, and second, whether defendant Time, Inc., acting through its Life Magazine employees, printed the statement with knowledge that it was false or with reckless disregard of whether it was false or not.

Plaintiff, a hapless private citizen, involved in a divorce proceeding with attendant wiretapping activity at the behest of her husband and his private detective-minion, was partially the subject of a Life article on wiretapping where she was charged with getting one of her husband's private detectives "to sell out and work for her." This statement

was alleged to be false and defamatory. The article in pertinent part is printed in the margin.[3]

In publishing the article, Life relied entirely on the text of a long telegram from a stringer correspondent, Chandler. The pertinent part of the text is contained in footnote 16 of Judge Ainsworth's opinion. What appears from the text is that Mrs. Firestone "wooed one of Harwood's top investigators, Carl Geisler, to work in her interests." Chandler then quoted Mrs. Firestone as recounting an invasion by Harwood, Geisler and another private detective into her bedroom, through the medium of kicking the door down. The persons in the bedroom at the time were Mrs. Firestone, her baby and the baby's nurse. Harwood expected to find a man in the house with Mrs. Firestone at the time, and the raid was on the signal of Harwood's lookout, Geisler. Chandler stated in the telegram to Life that Harwood said to him that it was "on this occasion that he first knew that Carl Geisler had sold him out" to Mrs. Firestone.

Life's conduct must be justified on the text of the telegram. The language of the telegram was escalated to some extent in the article but probably not to a prohibited degree. The rub comes from other facts contained in the telegram. There was much to put Life on notice to move cautiously. The description of Harwood's work style was revolting to the point that one might question his credibility. In addition, Chandler drew the conclusion

3. "TWO-WAY SNOOP. In Florida, where electronic eavesdropping is frequently employed in divorce suits, private eyes like Jack Harwood of Palm Beach, shown above with some of his gear, do a thriving business. Harwood, who boasts, 'I'm a fantastic wire man,' was hired by the tire heir Russell Firestone to keep tabs on his estranged wife, Mary Alice. She in turn got one of Harwood's assistants to sell out and work for her and, says Harwood, 'He plays just as rough with the bugs as I do.' A court recently ordered Russell and Mary Alice to stop spying on each other."

that Harwood had "developed a paranoiac hatred" of Mrs. Firestone. Life made no check with anyone other than Chandler before publishing the statement.

Nevertheless, I do not find it necessary to reach the question whether a fact issue is presented as to reckless disregard on the part of Life. I get no further than the preliminary question whether the proof is clear and convincing that the statement was false. The record will be searched in vain for clear and convincing proof that Mrs. Firestone did not arrange in some manner for the services of Geisler, a former private detective for Mr. Firestone. There is no express denial from Mrs. Firestone of the fact. There is unrefuted evidence that Geisler was working with and under Harwood for Mr. Firestone. There is substantial evidence that he was later in the service of Mrs. Firestone on some basis.

The district court made no subsidiary findings of fact on falsity. At most, there was an assumption of falsity. As the court stated in *New York Times v. Sullivan*, 376 U.S. at 284-85, where the case might have been retried if remanded or reversed, ". . . we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for [plaintiff]."

The record as a whole, including all subsidiary facts that might lend support to the allegation of falsity, is bereft of clear and convincing proof of falsity. There the matter ends.

II

I also wish to register disagreement with the new procedure announced by Judge Ainsworth of deciding First Amendment cases *de novo*. I do not take the use of the

term "*de novo*" for the first time in the plurality opinion in *Metromedia* (three justices), 403 U.S. at 54, to establish a new and different standard of review in First Amendment cases from that previously announced by the Supreme Court.

The term "*de novo*" is not one to be used indiscriminately, given its other uses in procedural law. One ordinarily thinks of a trial *de novo* when a case is appealed from one trial tribunal to another. Perhaps the most familiar use of the term in the federal courts was in the old admiralty practice where appellate courts reviewed admiralty trials *de novo* and could take additional proof where indicated. Judge Godbold in *Caradelis v. Refinera Panama, S.A.*, 5 Cir., 1967, 384 F.2d 589, 592-93, discussed this former practice and the abolition of it by the Supreme Court in *McAllister v. United States*, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20, which applied the clearly erroneous principle of Rule 52, Federal Rules of Civil Procedure, to admiralty cases.

When considering the state of records to be reviewed in appellate courts, state and federal, jury and non-jury trials, it becomes apparent that the use of the term "*de novo*" in *Metromedia* was one of emphasis—to the end that reviewing courts must carefully consider the facts pertaining to constitutional questions. We do this by making our own careful examination of the record, with particular scrutiny of the underlying or subsidiary facts—to see if the factual conclusions meet the high standard set in *New York Times*, supra, of finding clear and convincing proof. This is the teaching of *New York Times, Metromedia, Time v. Pape*, 1971, 401 U.S. 279, 284, 91 S.Ct. 633, 28 L.Ed.2d 45; *Edwards v. South Carolina*, 1963, 372 U.S. 229, 235, 83 S.Ct. 680, 9 L.Ed.2d 697; *Blackburn v. Alabama*, 1960, 361 U.S. 199, 205 n.5, 80 S.Ct. 274, 4 L.Ed.2d

242. This leaves the law as a workable institution. A *de novo* review in the traditional sense would reduce the trial courts to a level below that of a master; they would simply be recorders of the evidence. There would be no one to make credibility choices. We are not told what would be done with jury verdicts nor with the Seventh Amendment. This is not my reading of the plurality opinion in *Metromedia*.

I hasten to add that Judge Ainsworth has only used the term "*de novo*" in his review of the record. I neither perceive nor suggest that he would or has ignored credibility findings or the clearly erroneous rule as it applies to underlying or subsidiary facts as distinguished from conclusions of fact.

GODBOLD, Circuit Judge, SPECIALLY CONCURRING:

I concur in the result reached by Judge Ainsworth, but I am not able to join in all of what he has said. It seems to me that some caveats are necessary.

I agree that the constitutional guaranty now extends to discussion and communication involving "an issue of public or general concern." However, the reach of that term was not an issue in *Metromedia*, which left the delineation thereof to future cases, *Rosenbloom v. Metromedia*, 403 U.S. 29 at 44-45, 29 L.Ed. 2d 296, at 312 (1971). The plurality opinion in that case recognized that there are areas of a person's activities that fall outside the scope of public or general interest. While I accept that the publication in this case was within the *Metromedia* phraseology, it seems to me important to note that the publisher may not, by mere artful characterization, force into the ambit of the phrase activities otherwise outside of its scope.

Secondly, Judge Ainsworth's opinion chooses as a standard of review "independent de novo review" without

definition of what that illusory term means. The phrase alone does not adequately answer the question of the extent to which, in making an independent examination of the record, we give effect or deference to lower court findings. However, the cases relied upon by Justice Brennan, 403 U.S. at 54, 29 L.Ed. 2d at 318, flesh out the term. They seem to me to compel rejection of any implication that review is to exclude a residual deference to lower court findings. *Edwards v. South Carolina*, 372 U.S. 229, 235, 9 L.Ed. 2d 697, 701-02 (1963), refers to the "duty . . . to make an independent examination of the whole record" [citing footnote 5 of *Blackburn v. Alabama*, 361 U.S. 199, 205, 4 L.Ed. 2d 242, 247 (1960)], but in the sentences immediately preceding, 372 U.S. at 235, 9 L.Ed. 2d at 701, *Edwards* recognized that the Supreme Court "may accept . . . as binding" the decision of the state court that the petitioners' conduct constituted breach of the peace under state law.

Footnote 5 of *Blackburn* said this: "It is well established, of course, that although this Court will accord respect to the conclusions of the state courts in cases of this nature, we cannot escape the responsibility of scrutinizing the record ourselves." The footnote supports the statement in text that the Court has accorded to the trial judge's decision "all of the deference . . . which is compatible with our duty to determine constitutional questions." 361 U.S. at 205, 4 L.Ed. 2d at 247. Cited in footnote 5 is *Pierre v. Louisiana*, 306 U.S. 354, 83 L.Ed. 757 (1939), which held that "the conclusions reached by the Supreme Court of Louisiana are entitled to great respect" but that the Court has a duty to make independent inquiry and determination of the disputed facts.

These cases make clear that the newly-employed phrase "de novo" does not mean that the appellate court's duty to make an independent examination of the record is to be pursued in the manner of a plenary new trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-1887

D. C. Docket No. 66-907
MARY ALICE FIRESTONE,
Plaintiff-Appellee-Cross Appellant,

versus

TIME, INC.,
Defendant-Appellant-Cross Appellee.

Appeal from the United States District Court for the Southern District of Florida

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that plaintiff-appellee-cross appellant pay to defendant-appellant-cross appellee the costs on appeal to be taxed by the Clerk of this Court.

April 20, 1972

BELL, Circuit Judge, SPECIALLY CONCURRING:

GODBOLD, Circuit Judge, SPECIALLY CONCURRING:

Issued as Mandate:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for a Writ of Certiorari and Appendix has been furnished Frates, Floyd, Pearson & Stewart, Attorneys for Respondent, Twelfth Floor Concord Building, Miami, Florida 33130, by mail, this 16th day of June, A. D. 1972.

JOS. D. FARISH, JR.
Attorney

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-7

MARY ALICE FIRESTONE,
Petitioner,

v.

TIME, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-7

MARY ALICE FIRESTONE,
Petitioner,

v.

TIME, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to the United States Court of Appeals for the Fifth Circuit which on April 20, 1972, reversed a judgment recovered by petitioner in the District Court based on a claim of defamation in an article appearing in the May 20, 1966, issue of Life Magazine. On June 22, 1972, the Court of Appeals for the Fifth Circuit entered an order clarifying and amending its judgment and decree by substituting the phrase "REVERSED AND SUIT DISMISSED" for the phrase "REVERSED". A copy of that order is annexed hereto as Appendix A.

OPINIONS BELOW

The April 20, 1972 opinions of the Court of Appeals (two of which were concurring opinions) are not as yet

reported. They are annexed to the petition as Exhibit A. The opinion of the District Court appears at pp. 924-938 of the appendix below (hereinafter designated as A).

QUESTIONS PRESENTED

Three questions have been presented concerning recent First Amendment cases dealing with constitutional protection in connection with defamation and privacy. First, when does the mantle of constitutional protection fall? Second, if it does offer protection, precisely what is that protection? Third, by what means can the publisher avail himself of that protection?

The opinions in the Court of Appeals resolve those questions in this case in accordance with the applicable decisions of this Court, leaving nothing warranting the further attention of this Court.

STATEMENT

Mrs. Firestone, plaintiff and petitioner, is a former beauty queen, third wife of Palm Beach society millionaire Russell Firestone (heir to the Firestone tire fortune) and party to one of the most publicized divorce suits of the decade.[1] She filed suit for separate maintenance and custody of their child in November 1964. Her husband counterclaimed for divorce on grounds of extreme cruelty and adultery, and eventually prevailed, although plaintiff was granted custody of the child. In January 1966, during the pendency of the divorce action, it was reported that a court order had forbidden "surveillance by private detectives and

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[1]The intense public interest in that action is set forth in the opinion of the Florida District Court of Appeals in *Time Inc.* v. *Firestone*, 254 So. 2d 386 (1971), another action filed by this same plaintiff against petitioner based on a Time Magazine article which appeared in 1967. That action, also, has been dismissed on constitutional grounds. A petition for certiorari in the Supreme Court of Florida is presently pending unresolved.

wiretapping telephones or any other such tactics" by either party (A. 747-748). On April 6, 1966, the same order was again reported in connection with a $100,000 suit filed by Mrs. Firestone against a private detective for "openly shadowing her."

Meanwhile, wiretapping and eavesdropping—made possible on an ever greater scale by the increased sophistication of available equipment—had become a matter of great public interest and concern across the nation. The questions raised by the increasing frequency of use and great potential for destruction of privacy had led to widespread public debate and to then pending hearings on the matter before the United States Senate. In the spring of 1966, Life Magazine began work on an article on the subject.

The article, entitled "Snooping Electronic Invasion of Privacy", appeared in the May 20, 1966, issue of Life Magazine.[2] It comprised ten pages of photographs and text, including a description of the sophisticated equipment available for electronic eavesdropping and the techniques and occasions for its use. Noting that "the technology of snooping has so outdistanced the law that controls are all but nonexistent", Life called for increased public concern over the burgeoning threat to individual privacy.

Life pointed out that although the use of electronic snooping devices by government investigators is widespread, it is by no means the only, or even the primary, cause for concern:

> Federal agency and police operatives at least can argue that wiretapping and bugging are helpful aids in the enforcement of the law. But that justification does not exist for the growing legions of private citizens—busi-

[2]Since the article (defendant's Exhibit 1) does not lend itself to reproduction in the Appendix, extra copies are being served with this brief for the convenience of the Court.

> nessmen, union officials, employers, suspicious spouses —who find it ridiculously easy to indulge in electronic spying.

Several examples of the use of such tactics by private citizens were cited. Among them was the example of Jack Harwood of Palm Beach, who made a handsome living by providing private individuals with snooping services during their divorce proceedings. As an example of Harwood's services, Life cited his role in the Firestone divorce proceeding (which had been in the news for months) and the mutual spying which Life's investigation showed had taken place in that case.

Mrs. Firestone agreed expressly to be interviewed by Life's stringer Chandler because "she would like a story done" (A. 757-758). She knew that the proposed article dealt with electronic snooping (A. 758). With her permission, and over a two-day period, over 100 photographs were taken of her (A. 668, 675, 678, 679).

The District Court refused to give constitutional protection to the article and found for plaintiff. The Court of Appeals found that the constitution applied to it and reversed.

ARGUMENT

(a) This case does not warrant review

If this petition had been filed nine years ago, there would have been ample justification for this Court to review the case. We submit, however, that the result below was correct and in keeping with the applicable decisions of this Court beginning with *New York Times* v. *Sullivan*, 376 U. S. 254 (1964). There is no conflict of decisions and this case does not involve any important question which should be decided here. Instead, the issues dispositive of this case

have been substantially determined by this Court and there is nothing in this case warranting its further attention.

While the questions posed by petitioner are interesting, if correctly phrased, they are not presented in this case. The public interest in the Life article in question and plaintiff's legitimate connection therewith are clear and were found unanimously by all three members of the Court below. There was no proof of falsity whatsoever by plaintiff so that, whether such proof need be made by a preponderance of the evidence or with convincing clarity, is immaterial. Finally, while we believe Judge Ainsworth was correct in his application of the *de novo* review doctrine as enunciated by this Court, Judges Bell and Godbold found for respondent without use of that doctrine and, as pointed out by Judge Bell at the conclusion of his concurring opinion (petitioner's Appendix A, p. 24), Judge Ainsworth did not need the *de novo* review doctrine for the result which he reached in the case.

In essence, plaintiff is relying upon application of a negligence standard, disregarding that negligence is plainly not the test under the Constitution, as clearly enunciated by this Court in *New York Times* v. *Sullivan*, 376 U. S. 254, 288 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64, 79 (1964); *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967); *St. Amant* v. *Thompson*, 390 U. S. 727, 731-732 (1968) and *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 50-51 (1971).

(b) Public interest

The publication in this case clearly dealt with a matter of public interest. Wiretapping and eavesdropping and particularly their employment by private citizens, have been matters of considerable public concern for years.

Indeed, the article in this case was triggered by an investigation which was being conducted by a Senate committee into the use and misuse of such devices.[3]

Moreover plaintiff, who had commanded a substantial amount of independent public interest prior to this publication, voluntarily thrust herself into a matter of important public interest by consenting to have a story done about her. No one compelled her to give those interviews. She voluntarily and willingly participated because "she would like a story done . . ." (A. 758). And, as she herself readily and repeatedly admits, she was well aware that the subject of the proposed publication was electronic snooping (A. 173, 174, 176, 178, 188, 191).

Any attempt to avoid the effect of First Amendment cases by asserting that, although the publication as a whole concerned a matter of legitimate public interest, the particular reference to plaintiff did not is simply untenable. The whole point of the article, and the matter of public interest, was that private citizens have access to the means of snooping for their own ends in far too many cases. A well publicized example of that was the "two-way snoop" engaged in by the Firestones. To hold that the use of these devices by private citizens is a matter of public interest, but a particular private citizen's use of them is not, is to establish a rule that would make it virtually impossible to report on any matter of vital public concern, since the publisher

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[3]The continuing national concern with electronic surveillance was again evidenced at the American Bar Association's recent mid-year meeting where, after extended debate, the ABA House of Delegates adopted Standards Relating to Electronic Surveillance. A.B.A.J., Vol. 57, April 1971, pp. 356-358; American Bar News, Vol. 16, No. 3, March 1971, p. 1. See also *United States* v. *United States District Court for the Eastern District of Michigan, Southern Divison, et al.*, U. S. #70-153, decided June 19, 1972.

would be reduced to making abstract assertions completely devoid of concrete examples.[4] Such writing would not be reporting at all, but merely theorizing.

Plaintiff in this case is, of course, a "public figure" in any event. As the wife of the heir to the Firestone tire fortune she had world-wide notoriety. And, when she instituted what developed into one of the most sensational and publicized divorce cases of the decade, public attention was riveted on her. Even aside from her fame stemming as a Firestone and the publicity she was receiving as a result of the divorce, she clearly became a fair subject of public comment to the extent that she indulged in the practices with which the Life article was concerned. When a person does things which are "illustrative" of matters of public interest, that person cannot claim the status of a private citizen with regard to reports of those activities.

The fact that the person who is engaging in such activities may attempt unsuccessfully to screen those activities from public view is likewise irrelevant. Thus, the activities of a foreign spy ring or criminal syndicate theretofore entirely unknown would be a subject of constitutionally protected expression, notwithstanding the strong preference on the part of the individuals involved that those activities remain unpublicized. Here, it is undisputed that Mrs. Firestone employed private detectives. Indeed, at one time, she

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[4]Compare the concurring opinion of Mr. Justice White in *Rosenbloom* v. *Metromedia*, 403 U. S. at p. 61.

The District Court in rejecting Constitutional protection because the reference to plaintiff "could have been deleted entirely" (para. 10) obviously relied on the District Court opinion in *Ragano* v. *Time, Inc.*, 302 F. Supp. 1005 (M.D. Fla. 1969), ignoring that the rationale of the District Court had been rejected in the opinion of the Court on appeal in that case (427 F. 2d 219) as it was later by this Court in *Time, Inc.* v. *Pape*, 401 U. S. 279 (1971). It is also significant that plaintiff's counsel at final argument relied heavily on the Seventh Circuit opinion in *Pape*, which was destined for an 8-1 reversal at the hands of this Court (A. 868, 918).

was even enjoined by the court from using surveillance tactics against her husband. At the very least she was a legitimate subject of comment.

It is clear that the essence of the protection afforded publishers by the First Amendment lies in the public interest test and that plaintiff's activities, as an illustration of a matter of public interest, come within that protection. Moreover, it is clear that Mrs. Firestone is a public figure. The cloak of constitutional protection is available to this publication. Unless plaintiff can show "actual malice", the publisher must prevail.

In short, this case is far removed from a purely private libel of a person who has not taken part in any public controversy or who has lived an obscure private life. The result below is fully in keeping with the holdings of this Court, beginning with *New York Times* and, in particular, *Curtis Publishing Company* v. *Butts,* 388 U. S. 130 (1967) and *Rosenbloom* v. *Metromedia,* 403 U. S. 29 (1971). This case does not present any new or novel question not previously considered by this Court, and it certainly is not an appropriate vehicle for considering what constitutional standards may govern the adjudication of purely private actions.

(c) Proof of falsity with convincing clarity

This problem is just not presented by this case. Judges Ainsworth and Godbold did not touch upon it in their opinions, since they found that there was no proof with convincing clarity of knowledge of falsity (*New York Times*) or serious doubts as to truth (*St. Amant*) (as is clear from the record). While we believe that Judge Bell applied the correct test that falsity must be proved with convincing clarity, as set forth by this Court in *Garrison,* supra at 74, that application is, in reality, immaterial, since not only was there neither proof of falsity with convincing clarity nor

proof of falsity by a preponderance of evidence, there was no proof of falsity at all.

We think these points are clear from a mere reading of the opinions below. However, as an aid to the Court, we annex hereto, as Appendix B, extracts from our main brief below and, as Appendix C, extracts from our reply brief below in which we set forth with more detail and precision the nature of the proof presented at trial with respect to falsity, knowledge of falsity and serious doubts as to truth.

(d) De novo review

As stated above, this question, again, is not presented for review in this case since neither Judge Bell nor Judge Godbold utilized that device and, while Judge Ainsworth did, it was not necessary to his decision. However, we think that the discussion of *de novo* review by Judge Ainsworth is clearly correct and follows the explicit directives of this Court for an independent review of the evidence as stated in *New York Times, supra* at p. 285; *Time, Inc.* v. *Pape,* 401 U. S. 279, 284 (1971); *Rosenbloom* v. *Metromedia, supra* at pp. 53-54; *Time, Inc.* v. *Hill, supra* at 391 et seq.; *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 156 *et seq.* (1967); *Beckley Newspapers Corp.* v. *Hanks,* 389 U. S. 81, 83 *et seq.* (1967); *St. Amant, supra* at 370 *et seq.* and *Greenbelt Cooperative Publishing Association* v. *Bresler,* 398 U. S. 6, 11 *et seq.* (1970). As the opinions in the Court below state, the principles of these cases preclude recovery by petitioner regardless of what label is used to describe the review process.

CONCLUSION

The petition does not present any questions warranting review by the Court and should be denied.

July 12, 1972

Respectfully submitted,

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APPENDIX A

Order of the United States Court of Appeals for the Fifth Circuit Filed June 22, 1972

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1887

MARY ALICE FIRESTONE,

Plaintiff-Appellee-Cross Appellant,

VERSUS

TIME, INC.,

Defendant-Appellant-Cross Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion filed by Defendant-Appellant-Cross Appellee Time, Inc., for clarification of the Court's decree and mandate in the above cause is hereby GRANTED; our holding that the judgment appealed from is "REVERSED" necessarily carries with it dismissal of plaintiff's suit, a new trial not being contemplated by our decision. Our judgment and decree will be accordingly amended to show our disposition of this case as "REVERSED AND SUIT DISMISSED."

APPENDIX B

2. Preparatory investigation for publication.

Plaintiff was involved in only one-half of a page of the ten page article. The information for that part of the article was supplied by David Chandler, an independent reporter hired by Life for this assignment, and Charles Rapoport, a freelance photographer, also hired by Life for this assignment.[5] Chandler had been assigned by Editor Richard Billings to cover the Southern United States in connection with the wiretapping and eavesdropping story which was being prepared (A. 241, 244). While working in Miami, Chandler read an article in the Miami Herald which reported that a judge in Palm Beach has issued an order restraining Mr. and Mrs. Firestone from using surveillance tactics on each other in their divorce litigation (A. 654, 748).

Chandler and Rapoport traveled to Palm Beach, where Chandler learned that private detective Jack Harwood was working for Russell Firestone in connection with the divorce (A. 654, 748). He interviewed Harwood at length, and was told several stories about Harwood's snooping activities in general and his efforts on behalf of Russell Firestone in particular. (A. 748, 749, 752, 753). Rapoport also took several pictures of Harwood with his various types of "bugging" equipment. (A. 659).

In that interview, Harwood related that during the Firestone divorce, an assistant identified as Carl Geisler had *sold him out* and went over *to work* in Mrs. Firestone's behalf. He told of a raid which Geisler had set up, supposedly to catch Mrs. Firestone in compromising circumstances but which had backfired when Mrs. Firestone turned out to be in an innocent situation. He stated that

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[5]Chandler and Rapoport were not Life employees but were independent contractors, retained and paid on an hourly basis for specific assignments. (A. 697, 741, 831). They were paid on a time basis. (A. 831) received no fringe benefits and paid their own taxes. (A. 697, 741).

it was on this occasion that he knew Geisler had *sold him out*, using those precise words. (A. 76, 754).

Chandler then sought to interview both Mr. and Mrs. Firestone but was able to reach only Mrs. Firestone. She agreed to meet him and Rapoport at the home of a friend, Lily Pulitzer, because "she would like a story done". (A. 757, 758). There, Mrs. Firestone asked that her attorney, Joseph D. Farish, Jr., be allowed to review the notes of her interview, to which Chandler agreed. (A. 758). She also requested that she be interviewed at her home and an appointment was made for the following day.

When Chandler and Rapoport arrived at Mrs. Firestone's home the next day they were met by Carl Geisler who was then working for the plaintiff. (A. 661, 684, 759, 764, 769). Geisler asked Chandler and Rapoport for identification, and they produced their press cards. (A. 661, 760). Geisler asked them for the name of a person at Life with whom he could check and they gave him Billings' name. (A. 761). After a telephone call to Billings, Geisler was satisfied with their credentials. (A. 661, 662, 761, 762).[8]

Chandler's interviews of the plaintiff concerned the use of wiretapping and surveillance against her by her husband. (A. 173, 174, 176, 178, 181, 191, 758, 759). On the first day, the plaintiff related several incidents of surveillance against her by her husband, both before and during the divorce proceedings. (A. 762-764, 769, 775). One incident concerned the raid on her house which Harwood had described to Chandler, and in which Geisler had participated. (A. 764, 769). Geisler stated that at that time he had decided to change sides, because he was so appalled by the incident. (A. 764, 769). They also related the subsequent seizure of Mr. and Mrs. Firestone's son by Mr. Firestone and Geisler stated that it was at this time he made his open break with Harwood. (A. 769). They also told Chandler

[8]Billings confirmed that he received such a telephone call. (A. 247).

of the subsequent occasion on which Geisler and Mrs. Firestone's brother, Charles Turner, had caught a private detective named Balletti changing batteries in some eavesdropping equipment which had been installed in Mrs. Firestone's garage. (A. 771-772).

Rapoport had considerable photographic equipment with him (A. 660) and Mrs. Firestone and Geisler took Chandler and Rapoport on a tour of the house to look for good photographic backgrounds. However, no photographs were taken then since Mrs. Firestone requested that they wait until the following day because she did not look her best. (A. 662). Geisler requested that he not be photographed at all. (A. 762, 821). Both these requests were complied with, except for two photographs taken the following day in which Geisler inadvertently appears. (A. 678, 679, 760, 821).

Chandler and Rapoport returned the next day for photographs (A. 662, 776). Again, Geisler was present (A. 664, 776). They all left the house, with Geisler, Rapoport and Chandler in Chandler's car, following Mrs. Firestone who used her car to take her son to school and drive back home. Rapoport took several pictures during this trip. (A. 663, 776). Later the same day, Mrs. Firestone made a trip to the grocery store and to pick up her son and other children at school. Again, Rapoport followed and took photographs. (A. 664, 778, 779). Other photographs were taken at the Firestone's home, showing Mrs. Firestone reading and playing with her son. (A. 663, 667, 776). Some are full-faced close-ups of Mrs. Firestone looking directly into the camera. (A. 669). She requested that he photograph her left side, which she considered the more flattering and he attempted to comply. (A. 670, 674). The distance of the camera from Mrs. Firestone in these photographs varied from 3 to 20 feet, and she was always aware that she was being photographed. (A. 664, 666, 669, 672, 674). Well over 100 photographs were taken during the

course of the day, of which Chandler appears in one and Geisler in two. (A. 668, 675, 678, 679).

Later that afternoon, pursuant to Chandler's agreement to clear his notes of his interviews with her attorney, Geisler and Mrs. Firestone came by the motel where Rapoport, Chandler and Chandler's wife were staying and picked up Mr. and Mrs. Chandler to go to Farish's office. (A. 699-702, 780-782). They proceeded to Farish's office, where Chandler read the notes of his interviews with Mrs. Firestone and Farish responded that they sounded all right to him. (A. 703, 793, 794).

Throughout the two days of interviews and photographs, Geisler was present. He was representing Mrs. Firestone's interests as a bodyguard and private detective and both he and Mrs. Firestone made direct statements to that effect (A. 684, 685, 759, 760), in addition to the specific incidents which they related to Chandler of his past efforts on her behalf, some while he was still employed by Harwood. (A. 769, 771-773).

B. Life's Editorial Process—the writing of and basis for, the caption.

Based on his investigation in Palm Beach, Chandler composed a dispatch which he sent to Life on April 30, 1966, the entire text of which was read at trial. (A. 65-81). Included in that dispatch were the statements:

> [Mary Alice] wooed one of Harwood's top investigators, Carl Geisler, *to work in her interests.*
>
> * * *
>
> Harwood verifies this story [abortive raid on Mary Alice's home] and says it is on this occasion that he first knew Carl Geisler had *sold him out* to Mary Alice. His story: "I had left Geisler to watch the house. It was Russell's house and we had permission to enter. Geisler radioes me that Mary Alice and some other guy have

gone into the house and it's time to make the bust. We get to the house and Geisler points out the room he says Mary Alice and the guy are drinking in; we bust in the door. There's Mary Alice alone with the baby and nurse. We look through the house. Nobody else. We bust right back out." [Emphasis added].

To Chandler the term sell out meant only that Geisler had betrayed the interest of his original employer. (A. 803, 819).[7] It did not mean either perjury or bribery. (A. 799). The term sell out came from what Geisler and Harwood had both told him and from the whole circumstances which he had learned. (A. 764-770, 816). Other witnesses in the case testified that to them sell out meant "that Mary Alice was buying one of Jack's assistants . . ." (A. 308); that one is "enticed to come away" by a competitor (A. 329); "to take someone else's detective" (A. 331); and would apply to priests changing religions. (A. 349).

The dispatch was received in New York by Richard Billings, Life Senior Editor, who had overall responsibility for preparation of the entire eavesdropping story. (A. 238, 241, 253). Relying on the information contained in the Chandler dispatch, Billings wrote the caption of which complaint is made in this case. (A. 253, 254, 256). Researcher Alan Patureau read the final version of the caption to Chandler over the telephone and confirmed with him that it was completely true and accurate. (A. 91). Both Billings and Patureau relied entirely on Chandler's report of his investigation. (A. 92, 256, 257, 263). Thus, Billings testified at trial as follows:

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[7]The examples used by Chandler to explain the term "sell out" were the recent accusations by the members of the postal unions that the union president had sold out in settling the strike and the accusations by the Allies in 1940 that the Soviet Union had sold out in signing the non-aggression pact with Germany. (A. 819). In neither case was perjury or bribery involved.

Q. You wrote this article? A. That is correct.

Q. Tell us where you got this information from, from which it is based? A. I got it entirely from this file received from David Chandler. (A. 256)

* * *

The Court: Where did you get this "sellout." That is the critical point of this lawsuit.

By Mr. Frates: Where did you get that information from?

A. I got it from Chandler's file.

The Court: Purely from his file, no other information?

The Witness: The answer to that question is "Yes, purely from his file," no other information. (A. 257).

* * *

The Witness: I have investigated this file very carefully.

The Court: But did you find any factual situation that indicated to you Mary Alice had purchased——

The Witness: Had wooed him? Well, I went only from the—what any connotation that you can take from the word "wooed." The fact that I was concerned with was not how she had lured him away. It was the fact that she had lured him away.

The Court: And you did not know she had. You only took his word, Chandler's word.

The Witness: Yes, that is correct. I took Chandler's word. Chandler was the source of this, right. (A. 263).

Specifically, Billings relied on certain factual statements contained in Chandler's dispatch to support the phrase *"sellout and work"*. He identified those portions of the dispatch as follows:

> . . . she wooed one of Harwood's top investigators, Carl Geisler, to work in her interests. Geisler and Mary Alice's brother, Charles Turner, combined as her and her 3-year-old child, Mark's, bodyguard. (A. 279).
>
> . . . Harwood verifies this story . . . It is on this occasion that he first knew that Carl Geisler had *sold him* out to Mary Alice. (A. 280). [Emphasis added].

Billings also relied on the portion of the dispatch which related the story, told by Geisler himself, of the occasion on which he and Turner had apprehended Balletti in Mrs. Firestone's garage. (A. 78, 79, 287).

Billings testified that he believed the caption to be true at the time he wrote it and still believes it to be true today. (A. 260, 265).[8]

Chandler, in turn, testified that all the information contained in the dispatch was accurate and that he believed the caption as published was true and so told Billings and Patureau prior to publication. He described the basis for his belief as follows:

> First, there is Mr. Harwood's statement that Geisler had sold him out, because of Mary Alice describing the incident of the sellout becoming manifest to him at the time of the raid, which he felt Geisler had set him up for and embarrassed him with this raid. He said that after the raid he started slowly phasing Carl Geisler out of the picture, but Carl Geisler still had access to his files. He said that he had received telephone calls that while

[8]All of the witnesses to Life's editorial process were completely consistent in their testimony even though none was still an employee of Time, Inc. at the time of trial. Billings had left some three years before the trial and Patureau, having been previously fired by Life, was clearly a hostile witness. Chandler was merely a contract writer or "stringer." And, Rapoport was, but is no longer, a free-lance photographer who did occasional work for Life magazine.

Geisler was in his employ, Geisler was meeting with Mary Alice and another attorney.

Then the next person I talked to on the subject was Mary Alice at the Pulitzer house, and she said she had a detective working for her, and she said we would meet him the next day, and we go to her house and the fellow that opens the door is the same Carl Geisler, and he starts telling us stories, first, that he is now a detective for Mary Alice, that he did work for Harwood, that at the same instance that Harwood said that Geisler's attitude became manifest, the night of the raid.

Geisler confirms this, and says that is the night that he switched sides, although he continued to work (A. 797).

* * *

. . . for Harwood, although his alligiance has switched to Mary Alice. (A. 798).

* * *

. . . and he says that the incident that caused him to make the open break with Harwood was the incident of the baby seizure. (A. 799).

* * *

. . . and this again dovetails exactly what Harwood says that Geisler switched sides, switched allegiance earlier; continued to work for Harwood and then openly made a break. (A. 799).

* * *

Also, as I say, it was manifest to me that Carl Geisler and Mary Alice were on very close personal terms, and then throughout the remainder of my meetings and Rapoport's meetings with Mary Alice, Geisler is there; he is functioning as her private detective . . . (A. 801).

* * *

The whole thing is whether you continue to work for his man that you changed sides from which Geisler

said he did. He worked for him at the raid, and he changed sides, but he did not quit. He did not make his open break until later. (A. 801).

* * *

. . . I do believe to this day that Geisler betrayed Harwood at a certain point, because when he mentally quit Harwood he did not tell Harwood he was quitting. When he mentally threw his sympathies and his work to Mary Alice, he did not tell Harwood that. He went ahead and continued to work for Harwood. (A. 803).

Thus, the publication was completely consistent with what Chandler had learned and reported in his investigation and it did not mean "inciting to commit perjury."

C. Damages claimed.

The plaintiff claimed that this publication injured her in her marital litigation. However, Judge James Knott, the trial judge, testified that the publication did not influence him in any way and made no difference in his evaluation of the testimony presented in that case. (A. 587, 598).

The plaintiff also testified that she had difficulty getting witnesses to testify in her marital litigation and she didn't want to subpoena them because she was "trying for custody". (A. 186). But there was no evidence that anyone refused to testify much less what relevant, noncumulative evidence could have been added. In fact many witnesses did testify in her behalf. (A. 187). And, even the plaintiff's friend, Donna Smith, who was "hesitant" stated that if subpoenaed she would have testified and would have told the truth. (A. 302). Moreover, the plaintiff was awarded custody so this entire claim is moot.

The plaintiff also claimed that this publication caused her great mental anguish. But she presented no medical evidence at all in support of that claim. However, the defendant did establish that plaintiff had been seeing a psychiatrist, both before and after the publication. He testified that she made no complaints to him about the publication, (A. 574, 577), and that she had substantially recovered from her psychiatric problems. (A. 581, 837). Finally, there was no evidence whatsoever that this publication ever subjected the plaintiff to distrust, contempt, ridicule or humiliation in the community, as she had claimed in her complaint. (A. 4).

B. The record shows, as a matter of law, that plaintiff failed to establish that the caption was false and was published with knowledge of falsity or serious doubts as to truth.

1. The standard

A plaintiff in a libel action to which the constitutional protection applies must prove "actual malice" with "convincing clarity". "Actual malice" means publication of a false matter "with knowledge that it was false or with reckless disregard of whether it was false or not", *New York Times vs. Sullivan, supra,* at 280. It is for the courts to determine whether this standard has been met—they must examine the statements in issue and the circumstances under which they were made to see whether the proof presented to show "actual malice" has "the convincing clarity which the constitutional standard demands." *New York Times vs. Sullivan, Id.* at 285-86. As the court stated in the recent case of *Time, Inc. vs. Pape,* 401 U. S. 279, 91 S. Ct. 633, (February 24, 1971), "in cases involving the area of tension between the first and fourteenth amendments on the one hand and state defamation laws

on the other, we have frequently had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff".

These principles—enunciated in *New York Times* and repeated in *Garrison vs. Louisiana,* 379 U. S. 64, 74 (1964), have remained constant as the Supreme Court has extended the doctrine of *New York Times* to articles involving public figures and matters of public interest. In *St. Amant vs. Thompson,* 390 U. S. 727 (1968), the Court explained that in cases concerning publications dealing with public figures and matters of public interest, as well as public officials, a plaintiff has the burden of showing that the publication is made with "actual malice" as defined in *New York Times* and later cases. The Court went on to explain what its cases mean with respect to the "reckless disregard" branch of its "actual malice" rule:

> These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubt as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrated actual malice. 390 U. S. at 731.

And the Court went on to emphasize that nothing less would "adequately implement first amendment policies," stating:

> It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of the probable falsity. Concededly the reckless disregard standard may permit re-

> covery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of other public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement first amendment policies. Neither lies nor false communications serve the ends of the first amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the first amendment protect some erroneous publications as well as true ones. We adhere to this view and the line which our cases have drawn between false communications which are protected and those which are not. *Id.* at 741-732.

"Actual malice" thus means "serious doubts as to truth" and "a high degree of awareness of probable falsity". *Garrison vs. Louisiana, Id.* at 74. Moreover, "intent to inflict harm" does not suffice—there must be "intent to inflict harm through falsehood", *Henry vs. Collins,* 380 U. S. 356, 357 (1965). The burden of proving actual malice is on the plaintiff, *Cepeda vs. Cowles Magazines & Broadcasting Inc.,* 392 F. 2d 417 (9th Cir. 1968), *cert. denied,* 393 U. S. 840 (1968), who must make an affirmative showing of facts from which defendant's probable knowledge of falsity may be constitutionally sustained, *Thompson vs. Evening Star Newspaper Co.,* 394 F. 2d 774, 776 (D. C. Cir.), *cert. denied,* 393 U. S. 840 (1968). Further, "actual malice" may not be presumed or inferred from the nature of the defamatory statement, *New York Times vs. Sullivan, supra* at 273; *Greenbelt Coop-*

erative Publishers Ass'n vs. Bresler, 398 U. S. 6, 13 (1970); *Washington Post Co. vs. Keogh,* 365 F. 2d 965 (D. C. Cir. 1966), *cert. denied,* 385 U. S. 1101 (1967); nor from defendant's refusal to detract the allegedly defamatory statement, *New York Times vs. Sullivan, supra* at 286; *United Medical Laboratories Inc. vs. Columbia Broadcasting System Inc. supra,* at 713; *New York Times vs. Connor,* 365 F 2d 567, 577 (5th Cir. 1966).

Viewed against this standard, *there is not a whisper of evidence in this case to support a finding of actual malice.*

2. Absence of proof of falsity.

In the first place, plaintiff has fallen far short of clearing the first hurdle on the way to satisfying her standard of proof under the Constitution, i.e., proof of falsity with convincing clarity. This is an element of actual malice under the Constitutional decisions *which was totally overlooked by the trial court,* but without which liability cannot be imposed. *Garrison, supra* at 74; *Rosenblatt, supra* at 84. Not one shred of evidence was offered that the caption was false, except Mrs. Firestone's own conclusionary statement to that effect. (A. 169), and her incredible testimony that Geisler did not work for her. (A. 206-210).

That must be measured against the fact that the plaintiff alleged in her complaint that:

> defendant well knew that the employee [Geisler] whom defendant states Mary Alice Firestone got "to sell out and work for her" was a private investigator whose testimony and investigations were an integral part of this pending Divorce action. That defendant knew that said employee [Geisler] was to become, and in fact did become, a witness in that Divorce action. (A. 4).

Indeed, in paragraphs 7, 8 and 9 of her amended complaint, the plaintiff refers to Geisler no less than six times as her

"employee". (A. 4, 5). Then when she filed an affidavit in opposition to defendant's motion for summary judgment, plaintiff testified only:

> That your dependent never stated to Mr. Chandler or anyone else that she was instrumental in having Geisler switch allegiance to her from Jack Harwood.

Of course, Geisler was present in the photographs taken by Rapoport which were further evidence of his involvement with the plaintiff.

Plaintiff not only denied Geisler's employment and his presence at the interviews, but also, apparently on the theory it would make her version more plausible, she denied the presence of Rapoport and the taking of photographs of her. But those plans were laid without knowledge that the photographs were still in existence, of which even her counsel was not aware. (A. 194).

Plaintiff also claimed that there was only one interview with Chandler and the only other person present was her brother, Charles Turner.[13] (A. 172-176, 189-192). At one point, according to Mrs. Firestone's testimony, her brother left the room long enough for Chandler to proposition her and threaten her with an unfavorable story in Life because she refused.[14] (A. 174, 175). Even though he allegedly propositioned her, according to her version later the same day Mary Alice Firestone and her brother went to Farish's office, where they met Chandler by prearrangement (A. 175, 176).

However, that testimony is completely belied by that of David Chandler, Patricia Chandler and Charles Rapo-

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[13]Turner never verified this, although he testified on behalf of his sister in rebuttal on another matter.

[14]Chandler denied this preposterous claim (T.T. 880-82). He had not brought his wife of less than a year (T.T. 782) along on a business trip so that he could proposition Mrs. Firestone. The trial court evidently agreed that such a claim was incredible for there is no mention of it in his opinion.

port, and by a total of 142 photographs which were introduced into evidence. (Exs. 2A-G, 3A-G, 4A-B, E-F). Even the district court did not believe plaintiff's testimony for when the photographs were ordered into evidence, the court stated:

> I will overrule it and receive the pictures. They are of no great consequence in my opinion, in this case. *It is pretty well agreed that they took some pictures with her consent* and they were done to—theoretically—to build up a case against eavesdropping and that type of thing—(A.682) (emphasis added).

Again, following Chandler's testimony concerning his findings during his investigation which led him to believe that Geisler had sold out and gone to work for the plaintiff, the Court stated:

> Anyway, the question—we only have one question in this case; what was the connotation of your statement on that article as to whether or not—what is a sellout, in other words. All right, go ahead, and I am very happy in this case that there is enough frankness to—*there is no dispute of what was done.* (A. 802). (Emphasis added).

Defendant also conclusively established[15] Geisler's affiliation with the plaintiff and her attorney. A witness

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[15]It should not have been necessary for defendant to introduce this evidence at all. Under *New York Times,* the burden should be on the plaintiff to prove falsity with convincing clarity, a burden which clearly was not carried. The district court's ruling that the Constitution did not apply forced defendant to present an affirmative defense of truth. Given the inherent unreliability of the kind of people defendant was forced to call (that, after all, was the whole point of the Life caption), this task was rather difficult particularly because most of its questions to necessarily hostile witness were blocked either as leading or as an endeavor to impeach. Nevertheless, some significant evidence of the truth of the caption was adduced.

subpoena for Linda Firestone, Russell's previous wife, was issued by Joseph Farish, Mrs. Firestone's lawyer, and served on June 17, 1966 by C. Geisler. (A. 517-520, 840-843).

Chandler's notes, his dispatch and his testimony all indicated that Geisler and Mrs. Firestone had told him of an incident which had occurred on New Year's Eve, 1965, when Geisler and Mrs. Firestone's brother apprehended a private detective named Balletti in Mrs. Firestone's garage, while he was in the process of changing the batteries in some eavesdropping equipment.

Defendant's counsel interviewed Balletti and his partner, Perry, on the morning of August 19, 1970, and they both confirmed that the incident had occurred substantially as it had been told to Chandler. They also confirmed that the man who appears in one of Rapoport's photographs with Mrs. Firestone is Carl Geisler. Following a conference with Farish, Mrs. Firestone's attorney, Balletti on the afternoon of that same day decided to invoke the Fifth Amendment with regard to his activities and observations of that evening, although he admitted his prior conference with defendant's counsel and his subsequent change of mind. He had also had a marked change of mind about his positive identification of Geisler in the photograph, although he admitted that "it looks like him" and that he had positively identified him as Geisler a few hours earlier. (A. 457, 458).

Perry testified that, following Balletti's arrest, he went to the police station where he saw Geisler and Mrs. Firestone engaging in conversation. (A. 440-443). Perry also stated that the man in Rapoport's photograph appeared to be Geisler. Perry's recollection, however, also seemed to have diminished since that morning. (A. 444-446).

Harwood, in addition to the testimony given in his deposition confirming his statements to Chandler, testified

at trial that Geisler had in fact worked for him (A. 469, 470), that he had subsequently seen Geisler in Mrs. Firestone's company on two occasions and that he suspected that Geisler had become friendly to Mrs. Firestone's side of the litigation. (A. 470, 471, 478). He was quite vague on the subject of his statements to Chandler and the trial court refused to allow use of his deposition testimony to refresh his recollection (A. 474, 483).[16] As a result of that ruling and the trial court's rigid view of what constituted a leading question, (A. 470, 471, 481, 483, 534, 535), Harwood's hostility was difficult to overcome. At one point, however, he finally admitted having testified at his deposition that he told Chandler that it was his opinion that Geisler had sold out to the other side in the divorce case and that that testimony was correct. (A. 486).

And, in final argument, the district court disbelieved plaintiff's testimony and agreed that Geisler had switched sides:

> Mr Frates: Carl Geisler worked for Russell Firestone.
>
> The Court: I have no doubt about that.
>
> Mr. Frates: Yes, sir. And then he worked for Mary Alice Firestone.
>
> The Court: I have no doubt that he worked in her behalf after he—finished working for Russell.

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[16]Incredibly, when Harwood sought to change his testimony the district court ruled that he couldn't be refreshed or confronted with his prior inconsistent testimony in his deposition.

> The Court: I have not seen any hostility. He certainly has not shown any. The fact that he does not say the same thing does not mean that he is hostile. Apparently he is not hostile. At least, I have not ascertained it to be. (A. 483). [See also A. 543].

> . . . That was a weakness in her case, that I thought she was hesitant about admitting a circumstance which seemed to be undeniable . . .[17]
> . . . I did not believe her story that she didn't know this man was there—was true. (A. 898, 893).

Somehow, the district court found actual malice based on reckless disregard of the truth without ever making any finding as to what the truth was. However, it is clear from the evidence that Geisler had switched allegiances from Harwood to the plaintiff, that Harwood told Chandler Geisler had sold out, that Geisler worked for the plaintiff in her marital litigation, that he was present during Chandler's interviews and that the plaintiff was repeatedly photographed during the interviews. There was a rational basis of truth for the dispatch submitted by Chandler and a rational basis of truth for the publication. On this basis alone defendant is entitled to dismissal of this case under *New York Times*.[18]

3. *Absence of proof of knowledge of falsity or serious doubts as to truth.*

Beyond the question of actual truth or falsity, there was *no* evidence offered to show knowledge of falsity or serious doubts as to truth. The editorial process, which is the focal point of the constitutional issue, is extremely simple in this case and compels the conclusion that actual malice was absent. Like any editor of a major publication, Billings received a dispatch from his reporter in the field and wrote material for publication in reliance on the facts contained in the dispatch. When the caption was written, he gave the text to a researcher, who, after checking the caption against the dispatch, telephoned Chandler, read the

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[17]In fact, the plaintiff was not "hesitant"—she flatly denied the "undeniable". (A.207, 208).

[18]By the same token, truth was proved as a separate complete defense.

caption and obtained Chandler's assurance that it was accurate. It is difficult indeed to see where knowledge of falsity or serious doubts as to truth could be involved in this sequence.

Certainly Billings believed that the caption was true. The only evidence which could possibly show actual malice on his part would be that the facts he included in the caption were proved false or probably false by the material which he had before him. That is clearly not the case here, for the caption is fully supported by the information contained in Chandler's dispatch. As Billings testified, there were two portions of the dispatch which specifically referred to Geisler's switch of allegiance and each of those fully supported the statement in the caption. First, there was the statement that:

> HARWOOD HAS BEEN SHADOWING MARY ALICE SINCE JUST BEFORE FEBRUARY, 1964. SINCE THAT TIME, HE HAS DEVELOPED A PARANOIAC HATRED OF HER. HE CALLS HER A NYMPHOMANIAC PIG. SHE HATES HIM, TOO, BUT IS LESS DESCRIPTIVE ABOUT IT. *SHE WOOED ONE OF HARWOOD'S TOP INVESTIGATORS, CARL GEISLER, TO WORK IN HER INTEREST,* GEISLER AND MARY ALICE'S BROTHER, CHARLES TURNER, COMBINED AS HER AND HER 3-YEAR-OLD CHILD, MARK, BODYGUARD. (A. 73). (Emphasis added).

Second, following the narrative of Mrs. Firestone's story of Harwood's raid on her house, the dispatch continued:

> (HARWOOD VERIFIES THIS STORY AND SAYS IT IS THIS OCCASION THAT HE FIRST KNEW *CARL GEISLER HAD SOLD HIM OUT TO MARY ALICE.*)

HIS STORY: "I HAD LEFT GEISLER TO WATCH THE HOUSE. IT WAS RUSSELL'S HOUSE AND WE HAD PERMISSION TO ENTER. GEISLER RADIOS ME THAT MARY ALICE AND SOME GUY HAD GONE INTO THE HOUSE AND IT'S TIME TO MAKE THE BUST. WE GET TO THE HOUSE AND GEISLER POINTS OUT THE ROOM HE SAYS MARY ALICE AND THE GUY ARE DRINKING IN. WE BUST IN THE DOOR. THERE'S MARY ALICE ALONG WITH THE BABY AND NURSE. WE LOOK THROUGH THE HOUSE. NOBODY. WE BUST RIGHT BACK OUT.
(A. 76, 77) (Emphasis added).

Finally, Billings relied on the numerous indications throughout the dispatch that Geisler was currently working on Mrs. Firestone's side of the case, and had been for some time, including particularly the incident on New Year's Eve of 1965, related by Geisler, when he and Charles Turner apprehended Balletti in the Firestone garage.

This showing made by defendant of its editorial process should have been the end of the case. As the trial court correctly found (para. 16), Billings was the person in the Life organization who was "responsible for publication", *New York Times, supra,* at 287,[19] and it was thus *only his knowledge or doubts* which are pertinent to the constitutional inquiry. The court also found, again correctly, that Billings based the caption on the information contained in Chandler's dispatch. It is undisputed that Patureau checked the caption against the dispatch, found it to be accurate, telephoned Chandler, and obtained confirmation from him. It was thus a misrepresentation of the facts to say that the

[19]Thus Chandler confirmed that he did not "publish". (A. 825).

caption was not "verified", even though Chandler was the only source. He was, after all, an eyewitness to all the material which he included in his dispatch. Where a statement was not verified, he said so (A. 79), or made it clear to whom the statement was attributed. (A. 71, 76).

The trial court apparently would not have been satisfied with the editorial process unless Billings and Patureau had personally traveled to Florida and repeated all the interviews. As Harold Allen testified, an editor cannot "verify" in the sense of retracing his reporter's steps, and must rely on his reporter's veracity. (A. 551, 560). And that is precisely what the Supreme Court validated in *Associated Press* v. *Walker,* 388 U. S. 130 (1967) in which the Associated Press editor was held to be entitled to rely on a dispatch from its reporter in the field by the name of Savell. (p. 141).

In addition to the specific use of the words *"sold out"* and *"to work"* in Chandler's dispatch, the facts and interviews reported in that dispatch support the conclusion that that was exactly what Geisler had done. It was recently held by the Supreme Court in the case of *Time, Inc. v. Pape,* 401 U. S. 279, 91 S. Ct. 633 (February 24, 1971), that actual malice in a libel case cannot be grounded on the deliberate adoption by the publisher of one of a number of rational interpretations of a document. Here, even if the conclusion that Geisler *"sold out and work[ed]"* is not the only one which can be drawn from the Chandler dispatch, it is at least a rational one.

Without finding that anything in Chandler's dispatch was false, the district court nevertheless asserts that Billings should not have relied on it because Chandler was "controversial". Whether or not a finding of actual malice may be based on evidence that the publisher relied on a reporter negligently (which cannot as a matter of law

constitute "actual malice"), that is clearly not this case. Throughout his career, as the evidence at trial showed, Chandler's reputation for accuracy has been low among those he exposed and high among his fellow journalists. To that extent only is it "controversial".[20]

Beyond the question even of Life's knowledge of falsity or serious doubts as to truth, the evidence of Chandler's investigation on the scene shows that it was thorough and complete. No criticism of it is made in the court's findings and the only possibility suggested by plaintiff's counsel at trial as something that could have been done during the investigation and was not done was for Chandler to have read the actual words of the caption (which, of course, he did not have)[21] to Mrs. Firestone and her attorney and secure their approval of those words. (A. 815). Proof of failure to do this does not even begin to make a negligence case, and it is clear that negligence falls far short of "actual malice". *New York Times, supra* at 288; *Garrison,*

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[20]Plaintiff sought to show Chandler had a bad reputation as a journalist. However, her only witnesses were six public officials or former public officials who had been either directly or indirectly criticized by Chandler for involvement in gambling or organized crime. Five of those very willing, cooperative and available witnesses were from New Orleans, Louisiana, a forum notorious for its treatment of this defendant and personnel working for it; however, their testimony dealt only with matters subsequent to this publication. (A. 140, 162, 352-395, 397-432). As to one of those witnesses, an injunction against harassing Chandler by subpoena was affirmed by this Court because of that individual's "acknowledged hostility" towards Chandler. *Chandler vs. Garrison* 286 F. Supp. 191 (E.D. La. 1968) aff'd 412 F.2d 857 (1969). Another of those five was a plaintiff in a suit against Life. As to the sixth witness, a Florida state attorney, a series of articles on gambling in his jurisdiction was subsequently awarded a Pulitzer Prize. (A. 549, 550, 553-556). More important, from the evidence it was clear that among his fellow journalists and former employers Chandler had an impeccable reputation for honesty and good reporting. (A. 551, 552, 607, 609, 632-635, 646-650).

[21]Although they were later read to him by Patureau for his approval.

supra at 79; *Hill, supra* at 389; *St. Amant, supra* at 731-32. Chandler has testified concerning the abundance of evidence on which he based his conclusion that plaintiff persuaded Geisler to sell out. It is clear that he could not have had actual malice even if that were pertinent to our inquiry.

The other factors relied on by the district court in its finding of actual malice were totally irrelevant to such a determination. The district court discounted Billings' testimony "because he was making money on doing this". (A. 257). Profit has been explicity ruled irrelevant to First Amendment cases by the Supreme Court in *New York Times vs. Sullivan, supra* at 266 and *Time, Inc. vs. Hill, supra* at 397. The district court further relied on a finding that plaintiff did not consent to the publication of an unfavorable article about her (para. 13), and upon Life's refusal to retract the publication (para. 14), although these elements have been held to be immaterial to the question of actual malice. *New York Times vs. Sullivan, supra* at 286; *United Medical Laboratories, supra* at 713; *New York Times vs. Connor, supra* at 577; *Hurley vs. Northwest Publications, Inc.*, 273 F. Supp. 967 (D. Minn. 1967) aff'd 398 F. 2d 346 (8th Cir. 1968). There is thus nothing left of the trial court's "evidence" of actual malice and defendant's motions to dismiss at the end of plaintiff's case (A. 20, 21, 436) and at the end of the entire case (A. 852, 853, 942-947) should have been granted.

Given the incontrovertible showing of defendant's good faith, and given the failure of plaintiff even to prove falsity with "convincing clarity", the judgment below cannot stand under the decisions of this and other courts.[22]

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[22]By the same token, there can be no recovery for the claimed invasion of privacy, since it must be measured by the same test as for defamation. *Time, Inc. vs. Hill, supra.* However, that point is now moot since the district court, under common law principles, found for the defendant on that claim.

APPENDIX C

In this case *de novo* review is important for a number of reasons. First of all is the constitutional perspective which will completely demonstrate the total lack of any proof of actual malice. This is especially important here where the case was tried non-jury and the district judge refused to apply the law or try the issues raised by the pleadings and this Court's prior opinion. *De novo* review is also important because of the undocumented charge by plaintiff that defendant has stated "falsehoods" in its brief. As the record will conclusively establish, defendant's brief—as documented by its numerous references to the appendix—is a completely accurate recounting of the evidence in this case. Indeed, the failure of plaintiff to attempt to document any such "falsehood" alone should demonstrate the lack of merit of that contention.

Indeed, as the record demonstrates, it is plaintiff who has made repeated misstatements of the evidence in her brief. For example, plaintiff states in her briefs (p.28) that there was no evidence "to tie Carl Geisler to appellee except the testimony of David Chandler" and (p. 29) that her "denial of employment of Carl Geisler stood uncontradicted". Such contentions cannot stand in view of the record in this case. Plaintiff herself in the amended complaint labels Geisler as her "employee" no less than six times. (A. 4, 5). In addition Chandler, his wife and Rapoport all positively identified Geisler's presence and employment. (A. 661, 678, 679, 684, 685, 699-702, 759, 760, 764, 769, 776, 780-782, 821). Harwood testified that Geisler had "sold out" to the plaintiff and that he had subsequently seen him with her on two occasions. (A. 471).[2]

[2]In her brief (p. 7) plaintiff contends that Harwood's *only* source of information was two anonymous phone calls citing pages 472 and 487 of the appendix. No such statement appears at either reference. And, in actuality, Harwood testified that Geisler's actions, particularly an abortive raid, first made him suspicious (R. 478). Then of course he received the phone calls and subsequently he personally observed Geisler with the plaintiff.

Two other private detectives also identified Geisler in photographs with the plaintiff. (A. 440-443, 457, 458). Finally, defendant proved Geisler's activities on plaintiff's behalf during the divorce litigation. (A. 517-520, 840-843). Even the district court finally concluded that Geisler had switched sides to the plaintiff: "That was a weakness in her case, that I thought she was hesitant about admitting a circumstance which seemed to be undeniable." (A. 892). Thus, contrary to plaintiff's representation, Geisler was directly proved to be her employee.

Plaintiff also (p. 10) makes the bold statement, without any record references, that she proved the article meant inciting to commit perjury. There is no evidence in this record to support that conclusion and the district court certainly did not so find. Indeed, the district court came to the exact opposite conclusion. (A. 897, 899, 907).

Likewise, she states (p. 13), again without a single record reference, that the evidence established that "she had severe difficulty in mustering witnesses" in her divorce litigation. This was not what she had complained about in this litigation. Her only complaint was that her employee's, Geisler, credibility had been damaged. (A. 4, 5). The trial judge in the marital litigation testified that the article did not affect that litigation (A. 587, 598) and the district court, after hearing all the evidence, observed "I don't think it interfered with the lawsuit." (A. 908).

The plaintiff's presentation of the evidence in her brief contains other unfounded conclusions. It also ignores pivotal testimony such as her incredible denial of the over 100 photographs taken of her by Rapoport. Suffice it to say that plaintiff's presentation is not accurate, as *de novo* review clearly demonstrates.

Turning then to the ultimate issue of actual malice, there is no evidence whatsoever to support a plaintiff's judgment

in this case. When plaintiff finally comes to grip with this issue, she rests her case, on the following points: (1) the alleged "proposition", (2) publication six weeks before the final hearing in the divorce action, (3) no permission by plaintiff,. (4) Chandler's allegedly "disgraceful" reputation and that he was hired after a one hour interview, (5) failure to make an independent verification and (6) that defendant "maintains a large staff of attorneys". When the case for actual malice is thus exposed, it is obvious that the judgment must fall.

The main thrust of the plaintiff's case is directed at Chandler, the stringer who gathered the information concerning plaintiff. No argument is made that Billings, the editor, or any other person connected with the publication did anything wrong nor is any argument made that anyone should have been in any way suspect of Chandler. To the contrary, the evidence shows that, as far as Billings was concerned, Chandler was highly competent.[8] Be that as it may, the important point here is that Chandler was not responsible for the publication (A. 825) and it is only the knowledge of those who are responsible for the publication that is relevant to the issue of actual malice. *New York Times vs. Sullivan, supra* at 287; *Associated Press vs. Walker,* 388 U. S. 130, 141 (1967).

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[8]Plaintiff argues that Billings hired Chandler after only a one hour interview without any investigation of his background or reputation (p. 6, 25). This is a perversion of the facts. Page 242 of the appendix, cited by plaintiff in support of its argument, actually reveals that Chandler was recommended by a Life stringer which Billings knew for as long as he had been wifth Life. Billings and another Life editor then interviewed Chandler along with five other applicants. And they determined that Chandler was "the best reporter of the bunch." Billings also testified that he had checked Chandler's references "by discussing him with his previous employers at New Orleans States-Item" and determined that he was "a man of high calibre". (A. 267). This then was a completely routine employment situation. And, this was all in 1964 (A. 264) and Chandler continued as a Life stringer through 1966 when the article in question was published and in 1970 when this case was tried below. (A. 741).

Moreover, the attack on Chandler boiled down to only plaintiff's testimony of the "proposition" and the opinions of six witnesses with open prejudice against Chandler. Not a single disinterested witness testified against him. Again the plaintiff's testimony was incredible. Even though she had been "propositioned" she continued to meet with Chandler and tell her story. Her own brother, who testified on her behalf and after Chandler had denied this claim, wasn't even asked to verify the events in which he participated which supposedly surrounded the "proposition". That claim cannot survive in view of such evidence and the district court apparently agreed since it was not mentioned in its findings. The opinions of Chandler's reputation, have already been demonstrated to be the prejudicial views of individuals who were adversely implicated in various investigations of gambling and organized crime in which Chandler had participated.[4] Their testimony was completely undermined by former employers and others who unanimously concurred in Chandler's high reputation for honesty and good reporting.

The remaining points of plaintiff's actual malice case are likewise without merit. Failure to obtain plaintiff's

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[4]On the basis of two of those prejudicial witnesses plaintiff states "Chandler had, in fact, lied in previous articles (A. 145, 362)". Page 362 is the testimony of Charles Ray Ward whose "acknowledged hostility" toward Chandler has already been reviewed by this Court. *Chandler vs. Garrison*, 412 F. 2d 857 (5th Cir. 1969). Page 145 is the testimony of Roland Capola who is a plaintiff against Time, Inc. (A. 725, Def. Ex. No. 13) and who had been implicated in an organized crime series published in Life during September 1967. However Capola didn't even know Chandler or his reputation. (A. 143). His sole knowledge of Chandler was an alleged by-line on one of those articles (A. 145) but the fact of the matter was that the article was written and by-line was by Sandy Smith. (A. 147, 721-723, 726, 727, Def. Ex. No. 12, p. 34 and 36). And just recently, in *Blanke vs. Time, Inc.*, another libel case arising from the same crime series, in which Chandler testified, a jury verdict was returned for the defendant. (A. 421).

permission or to otherwise investigate or verify before publication does not constitute actual malice. *Beckley Newspapers Corp. vs. Hanks,* 389 U. S. 81 (1967); *Hurley vs. Northwest Publications, Inc.,* 273 F. Supp. 967, 974 (D. Minn. 1967). And here of course, plaintiff voluntarily consented to be interviewed and discussed both her wire-tapping experiences and her marital litigation because "she would like a story done." (A. 757, 758). Even her attorney reviewed and approved of her interviews.

Publication before the marital litigation and the size of the defendant's legal staff or even its existence is likewise not proof of actual malice. Neither prove falsity or publication with knowledge of falsity or serious doubts as to truth.

Thus, when stripped to the bare bones, not a single one of plaintiff's arguments tends to even remotely show falsity, or knowledge of falsity or serious doubts as to truth, much less establish those requisites by the convincing clarity the Constitution requires. Indeed, the district court did not even find the article to be false which is the threshold issue in "actual malice". Since there is therefore no basis for plaintiff's judgment, defendant respectfully submits that the judgment below should be reversed with directions to enter judgment for the defendant.